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The Regulation of Defamation in Tort and Criminal Law A Comparative Study of England and France

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**The Regulation of Defamation in Tort and Criminal
Law**

A Comparative Study of England and France

Thesis submitted for the degree of
Doctor of Philosophy in Law

Mathilde Alfrida Groppo

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ABSTRACT

Defamation is a complex topic, historically lying at the crossroads of tort and criminal law. In the current state of the law, various common law jurisdictions (including England) have abolished criminal defamation. By contrast, civil law jurisdictions approach defamation first and foremost as a criminal offence, although in many countries (including France), the claimant's right is also civilly actionable. From a comparative perspective, this distinction supports a generally held view that the national particularisms of defamation laws reflect very different approaches to the protection of reputation. This thesis considers and challenges this view by critically examining the extent to which the nature of the regulation, tortious or criminal, influences the substantive content of the rules on defamation in England and France. It argues that the current regulatory features are the result of a haphazard historical development, rather than of a conscious choice. Thus, the distinction between tortious and criminal liability in England and France does not necessarily epitomise fundamentally irreconcilable conceptions of reputation. This suggests that the English and the French laws of defamation are comparable despite their different regulatory features. This is confirmed by studying key features of the law of defamation: standards of liability, the defence of truth and remedial aspects of the wrong. At first sight, their apparent differences seem to be justifiable on the basis of each system's disparate regulatory features. Upon closer analysis of each of these features however, elements of commonality emerge. The English and French rules on fault are comparable and are underlined by a shared concern to promote media accountability, their treatment of truth is becoming analogous, and the remedial aspects of defamation are functionally comparable. The thesis concludes that despite substantive differences owing to the regulatory features of each system, England and France adopt a shared conceptual approach to the wrong of defamation.

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Code pénal (1810)
Code pénal (1994)
Code de procédure civile
Code de procédure pénale
Code de la propriété intellectuelle

B. Laws and ordinances

loi salique
loi du 17 mai 1819 sur la responsabilité encourue par la voie de la presse ou par tout autre moyen de publication

loi du 26 mai 1819 sur le régime procédural applicable à leur poursuite
loi du 23 juin 1819 sur la publication et ses conditions administratives
loi du 29 juillet 1881 sur la liberté de la presse
loi n°80-1042 du 23 décembre 1980 portant réforme de la procédure pénale relative à la prescription et au jury d'assises
loi n°82-652 du 29 juillet 1982 sur la communication audiovisuelle
loi n°2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes
loi n°2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet

ordonnance du 6 mai 1944 relative à la répression des délits de presse

III. European Union legislation

European Parliament and Council Regulation (EC) 864/2007 of 11 July 2007 on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40

IV. Conventions

European Convention on Human Rights

INTRODUCTION

Defamation is a complex topic, historically lying at the crossroads of tort and criminal law. The nature of the regulation – tortious or criminal – varies greatly from one jurisdiction to the other. From a comparative perspective, such a distinction supports a generally held view that the national particularisms of defamation laws reflect very different approaches to the protection of reputation.¹ This thesis challenges this view by examining and challenging the existence of a link between the nature of the regulation (tortious or criminal) and the substantive content of the rules on defamation in England and France.

I. Background and context

The purpose of the law of defamation is to hold a balance between freedom of expression and the right to reputation.² In recent years, cross-border violations of the right to reputation have been facilitated by the increased accessibility of means of publication,³ including international newspaper circulation and internet posting.⁴ However, there exist no European rules determining which law should

¹ See, e.g.: European Parliament, Committee on Legal Affairs, ‘Working Document on the Amendment of Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II)’ (2010), 5.

² *Panday v Gordon* [2005] UKPC 36, [2006] 1 AC 427, [12]; in this sense: Richard Parkes *et al*, *Gatley on Libel and Slander* (Sweet & Maxwell 2013), 1.1; David Kenny and Liz Heffernan, ‘Defamation and Privacy and the Rome II Regulation’ in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2015), 315. On this balancing process, see further: Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, II; and Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IVA2.

³ Cross-border litigation in defamation is relatively rare (Ministry of Justice, *Report of the Libel Working Group* (2010) Annex B: Cases with a foreign connection issued in the High Court in 2009). However, Svantesson argues that ‘what is interesting is not the number of cases currently brought before the courts. After all, the small number of cases may be directly attributable to the complexity of the system... The significance of the problem is more accurately assessed by reference to the number of instances of cross-border violations of privacy and personality rights [including defamation].’ See: Dan Svantesson, ‘The Rome II Regulation and Choice of Law in Internet-Based Violations of Privacy and Personality Rights - on the Wrong Track, but in the Right Direction?’ (2014) 16 ARIEL 275, 276.

⁴ See, e.g. *Berezovsky v Michaels* [2000] UKHL 25, [2000] All ER 86. This is particularly true in a context in which the use of social media has become the norm, since tweets, retweets, Facebook and blog posts characterise the requirement of publication in both England and France. In England, this was brought to light in the case of *McAlpine v Bercow* [2013] EWHC 1342, which received extensive coverage in the media. This was also the focus of *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015, in which the Court of Appeal recognised at [27] ‘that as a

apply to defamation cases involving an international element.⁵ The answer to this question is found in each Member State's domestic choice of law rules.

This creates a complex framework for cross-border defamation claims. The substantive rules on defamation vary from one jurisdiction to the other.⁶ Yet, in the absence of unified choice of law rules, the law governing the parties' liability cannot accurately be predicted. One regular suggestion to simplify this state of affairs is to harmonise the substantive laws of defamation in the European Union.⁷ But the feasibility of this harmonisation is doubted. This is due to the perceived existence of 'wide divergences' in the conception of the right to reputation across the twenty-eight Member States, and in the content of domestic defamation laws.⁸

One major difference is the existence of two types of liability for defamation: tortious and criminal. The standards vary from one jurisdiction to another. Only in England has criminal defamation been fully abolished. Trends found in other Member States include the partial abolition of criminal defamation⁹ or, as is the

consequence of modern technology and communication systems any such stories will have the capacity to "go viral" more widely and more quickly than ever before. Indeed it is obvious that today, with the ready availability of the world wide web and of social networking sites, the scale of this problem has been immeasurably enhanced, especially for libel claimants who are already, for whatever reason, in the public eye.' On the law of defamation in the context of the internet in general and of social media more specifically, see: Laura Scaife, *Handbook of Social Media and the Law* (Routledge 2015), Chapter 3.

⁵ The 'Rome II' Regulation contains general rules on choice of law for torts and other non-contractual obligations. However, violations of privacy and rights relating to personality, including defamation, are expressly excluded from its scope in art. 1(2)(g). See: European Parliament and Council Regulation (EC) 864/2007 of 11 July 2007 on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40.

⁶ 'Working Document on the Amendment of Regulation (EC) No 864/2007' (n 1), 5.

⁷ Steering Committee on the Media and New Communication Services, 'Working Paper on the Alignment of Defamation Laws with ECHR Case-law' CDMC(2005)007 (2006); Directorate General of Human Rights and Legal Affairs, 'Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality' CDMSI(2012)Misc11 (2013); High Level Group on Media Freedom and Pluralism, *A free and pluralistic media to sustain European democracy* <http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf> accessed 13 May 2015, 22.

⁸ See, e.g.: 'Working Document on the Amendment of Regulation (EC) No 864/2007' (n 1), 5.

⁹ Member States that have partly abolished criminal defamation are: Cyprus, Estonia, Ireland and Romania. See: 'Out of Balance: Defamation Law in the European Union and its Effect on Press Freedom' (*Free Media*, 17 July 2014) <www.freemedia.at/fileadmin/uploads/pics/Out_of_Balance_OnDefamation_IPIJuly2014.pdf>

case in France, the more limited measure of abolishing the imprisonment penalty whilst preserving a criminal type of regulation.¹⁰ In the other Member States, defamation remains a criminal wrong punishable by imprisonment.¹¹ Beyond the issue of decriminalisation of defamation, this highlights the existence of substantive disparities between the Member States' legal systems. In the words of Glenn, 'difference implies isolation.'¹²

II. The research question

The aim of this thesis is to consider the extent to which the nature of the regulation, tortious or criminal, influences the substantive content of the rules on defamation in England and France. The argument is that despite substantive differences owing to the regulatory features of each system, England and France adopt a shared conceptual approach to the wrong of defamation. The thesis makes out that argument by examining central aspects of the English and French laws of defamation.

It is because of its practical consequences on the future development of the law that it is necessary to clarify the link between the nature of the regulation and the substantive content of the rules on defamation. In recent years, there have been various calls to decriminalise defamation on account of the fact that criminal libel produces a 'chilling effect' on freedom of expression.¹³ This is a routine

accessed 14 May 2015, 12-13. This information was collected by the International Press Institute under the European Commission-supported European Centre for Media Pluralism and Freedom Pilot project scheme. See: 'Digital Agenda for Europe: A Europe 2020 Initiative' (*European Commission*, 9 February 2015) <<https://ec.europa.eu/digital-agenda/en/news/out-balance-defamation-law-european-union>> accessed 27 July 2015.

¹⁰ Member States that have retained a criminal regulation but abolished the imprisonment penalty are Bulgaria, Croatia and France. See: 'Out of Balance: Defamation Law in the European Union and its Effect on Press Freedom' (n 9), 12-13.

¹¹ Ibid.

¹² H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, OUP 2010), 45.

¹³ For recent calls for reform, see: Parliamentary Assembly, 'Resolution 1577: Towards Decriminalisation of Defamation' (*Council of Europe*, 2007) <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>>; Parliamentary Assembly, 'Recommendation 1814: Towards Decriminalisation of Defamation' (*Council of Europe*, 2007) <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1814.htm>>; Commissioner for Human Rights, 'Human Rights and a Changing Media Landscape' (*Council of*

remark in the case law of the European Court of Human Rights, which finds its roots in the Grand Chamber judgment of *Cumpăna v Romania*.¹⁴ In that case, the seventeen judges stated that the ‘fear’ of criminal sanctions (which in this case included the imposition of a prison sentence) had a chilling effect on journalistic freedom of expression.¹⁵ In light of this principle, authors have noted the existence of a trend in the Court’s case law, whereby the use of criminal proceedings for defamation and injurious words was only warranted in narrow circumstances.¹⁶ However, the Grand Chamber appeared to go back on its previous position in the later case of *Lindon v France*,¹⁷ in which it did not declare the use of the criminal law as inappropriate for defamatory statements and injurious words uttered in the course of public interest debate. This is especially surprising when considering that a few weeks prior to the *Lindon* judgment, the Parliamentary Assembly of the Council of Europe had identified the French law of 29 July 1881 (which regulates defamation and injurious words) as being in need of reform ‘in light of the Court’s case law’.¹⁸ *Lindon* thus left the law in a state of confusion, and in need of clarification as to whether the chilling effect principle in *Cumpăna* extends to the French law of 29 July 1881. This would justify a renewed debate on the decriminalisation of the wrong of defamation, which was the object of a failed proposition by the Guinchard Commission in 2008.¹⁹

What is more, there is a perception that the domestic laws of defamation are fundamentally different across the European Union. These perceived issues with the law of defamation played a role in its express exclusion from the scope of the Rome II Regulation, which contributes to the harmonisation of European private international law. Kenny and Heffernan note that ‘defamation creates particular

Europe, 2011) <<http://www.coe.int/t/commissioner/source/prems/MediaLandscape2011.pdf>>; all accessed 14 May 2015.

¹⁴ (2005) 41 EHRR 14.

¹⁵ Ibid, [113]–[114].

¹⁶ Rónán Ó Fathaigh, ‘Article 10 and the Chilling Effect Principle’ (2013) 3 EHRLR 304, 308–09.

¹⁷ (2008) 46 EHRR 35.

¹⁸ *Resolution 1577: Towards decriminalisation of defamation* (n 13), [17.6.2].

¹⁹ Commission sur la répartition des contentieux présidée par Serge Guinchard, *L'Ambition Raisonnée d'une Justice Apaisée* (La documentation française: Rapports officiels 2008), 290ff.

issues, not least because it is intimately bound up with fundamental rights’;²⁰ and although the importance of the conflicting rights to reputation and to freedom of expression is recognised throughout the European Union, ‘there seems to be no common vision as to how [harmonisation] might best be achieved.’²¹ Under this view, harmonisation of defamation laws (whether of substantive or of private international law rules) is therefore impossible.

The present thesis informs our understanding of these issues. It proves that the nature of the regulation is not the sole, or sometimes even the primary determinant, of the substantive rules. This observation undermines the recurring calls to decriminalise defamation, and opens the possibility of finding grounds of agreement across the European Union as to how the balance between reputation and freedom of expression should be struck.

Although earlier studies have examined the substantive rules on defamation from a comparative perspective, their analysis was limited to specific issues and/or to jurisdictions belonging to the same tradition – common law.²² When they did engage with the law applicable in jurisdictions within the European Union, they considered the law applicable in various (if not all) the Member States.²³ As such, they did not engage in an in-depth comparative analysis. The present thesis takes a more extensive approach. It undertakes a comprehensive critical analysis of core elements of the English and French laws of defamation, which uncovers a shared conceptual approach to the right to reputation. This finding challenges the

²⁰ Kenny and Heffernan (n 2), 315.

²¹ Ibid, 326.

²² Andrew T Kenyon, *Defamation: Comparative Law and Practice* (UCL Press 2006); Adrienne Stone and George Williams, ‘Freedom of Speech and Defamation: Developments in the Common Law World’ (2000) 26 Mon LR 362; Itai Maytal, ‘Libel Lessons from Across the Pond - What British Courts Can Learn from the United States’ Chilling Experience with the ‘Multiple Publication Rule’ in Traditional Media and the Internet’ (2010) 3 J Int’l Media & Ent L 121; Elizabeth Samson, ‘The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England’s Modern Day’ (2012) 20 Cardozo J Int’l & Comp L 771. Descheemaeker’s work is one exception in that it engages with a comparison of defamation laws across legal traditions; however he also focuses on individual issues.

²³ András Koltay, ‘The Right of Reply in a European Comparative Perspective’ (2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162935&download=yes> accessed 27 May 2015; ‘Out of Balance: Defamation Law in the European Union and its Effect on Press Freedom’ (n 9).

perception that the ‘wide divergences’ in the legal systems across the European Union jeopardise any possibility of harmonisation.

The analysis draws on various fields of existing literature: comparative law, the scholarship on tort and crime, and legal history. Overall, the thesis provides an in-depth comparative analysis of the English and French laws of defamation, thereby uncovering elements of commonality.

III. Legal systems in this thesis

A. The choice of the legal systems in this thesis

This thesis focuses on the law of defamation in two jurisdictions: England and Wales, and France. Three key reasons justify this jurisdictional choice, which relate to each jurisdiction’s legal culture, the representative character of their regulatory features, and the (non-)existing framework within which tort and crime operate.

First, English and French law are part of different legal cultures. They are emblematic of the common and civil law traditions within the European jurisdictions. By focusing on these two legal systems, this project avoids the vagueness of a simple comparison as between ‘common law’ and ‘civil law’. Yet, it allows for a comparison that is not limited to providing insights into the foundations of a given subject-area of law – defamation. It also provides insights on each legal culture, thereby challenging some of the myths about the ‘other system’.²⁴

²⁴ On the destruction of myths being an integral part of the comparative lawyer’s role: Basil Markesinis, ‘The Destructive and Constructive Role of the Comparative Lawyer’ in Basil Markesinis (ed), *Foreign Law and Comparative Methodology: a Subject and a Thesis* (Hart Pub 1997), 438-39. For instance, I challenge the view that tort law is ‘an area of law where the legal rules have been developed by judges with limited statutory intervention’ (Paula Giliker, *The Europeanisation of English Tort Law* (Hart Pub 2014), 4). See Chapter 2: The framework of defamation liability in comparative historical perspective, IIIC1.

Second, the modern English and French laws have adopted different approaches to the regulation of defamation: while it is a tort in England, it is a criminal wrong in France. This is their most obvious point of divergence, and was a key motivating issue for this study. These regulatory features are representative of the regulation of defamation in other common law and civilian legal systems. Generally speaking, in common law jurisdictions defamation is primarily regulated as a tortious wrong. Indeed, various common law jurisdictions have abolished criminal defamation;²⁵ other common law jurisdictions recognise both civil and criminal legal actions with respect to defamation, with a primacy (both in number of cases and in doctrinal support) for the tortious approach.²⁶ By contrast, most civil law jurisdictions approach defamation first and foremost as a criminal wrong, although in many countries including France, the claimant's right is also civilly actionable.²⁷ The French system is particularly representative of the general approach to defamation liability found in European Member States. Twenty-three out of twenty-eight Member States still regulate defamation as a criminal wrong.²⁸ The majority of these legal systems possess a hierarchy of responsibility similar to the French one,²⁹ whereby the primary defendant is the

²⁵ E.g. England, Ireland and New Zealand have abolished the common law criminal defamation: see s. 73 of the Coroners and Justice Act 2009 (UK); s. 35 Defamation Act 2009 (Ireland); s. 56(2) Defamation Act 1992 (NZ).

²⁶ In the United States criminal defamation legislation does not exist at the federal level. Since 1964, 'sixteen states, and the District of Columbia, repealed their criminal libel statutes. Courts in other states subsequently struck down the laws on constitutional or other grounds. As a result, only 17 of 50 states retain criminal libel statutes' (Jane E Kirtley, 'Criminal Defamation: An Instrument of Destruction' in Anna Karlsreiter and Hanna Vuokko (eds), *Ending the Chilling Effect: Working To Repeal Criminal Libel and Insult Laws* (OSCE 2003), 91). Note that as of 2012, only 16 of 50 states retained criminal libel statutes ('Defamation Maps' (*Article 19*, 2012) <www.article19.org/defamation/map.html> accessed 7 April 2015). Similarly, in most Australian states (except the Northern Territory and Victoria) a version of a model provision on criminal defamation is in force. See: 'States and Territories Model Defamation Provisions' (*Australasian Parliamentary Counsel's Committee*, 21 March 2005) <www.pcc.gov.au/uniform/pcc-279-94-d10.pdf> accessed 23 September 2015, clause 4.2 (model criminal defamation provision); Crimes Act 1900 (ACT) s. 439; Crimes Act 1900 (NSW) s. 529; Criminal Code Act 1899 (Qld) s. 365; Criminal Law Consolidation Act 1935 (SA) s. 257; Criminal Code Act 1924 (Tas) s. 196; Criminal Code (WA) s. 345. Only the Northern Territory and Victoria did not adopt a version of the model provision: Criminal Code (NT) ss. 203-208; Wrongs Act 1958 (Vic) Pt 1.

²⁷ See, e.g. regarding the EU Member States and candidates (almost all of which are civilian jurisdictions): 'Out of Balance: Defamation Law in the European Union and its Effect on Press Freedom' (n 9), 8.

²⁸ Note that in many countries including England, other crimes might bear on defamatory speech. On this issue, see Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIIA2 and IVA2.

²⁹ Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIIC.

responsible editor or commercial publisher rather than the author.³⁰ Further, the French law on the press has sometimes influenced the legislation of other European jurisdictions, for instance in relation to the right of reply.³¹

Although the English and French laws represent the dominant approach to regulation of defamation within the common and civil law traditions, they also embody a specific type of regulation within a given tradition. As such, in comparison with a variety of other common law jurisdictions that retain a wrong of criminal libel rarely used in practice, England has chosen to abolish criminal defamation. Similarly, although a significant number of civilian jurisdictions regulate defamation as part of the criminal law, the French legislation is of specific interest because such a criminal wrong is not punishable by imprisonment.³²

Finally, the English and French legal systems approach the substantive and normative overlap between tort and crime in a distinctive fashion. While England has no overarching framework organising the relationship between both, French law has an elaborate procedural structure coordinating tortious and criminal claims.³³ Overall, these three factors suggest that England and France are of specific interest for a comparative study of defamation.

B. The comparability of the English and French legal systems

The past half-century has seen a remarkable evolution in the models used to map the world's legal systems. Comparatists have moved away from the rather rudimentary models of David's 'families'³⁴ and Zweigert and Kötz's grouping of

³⁰ Richard C Donnelly, 'The Right of Reply: An Alternative to an Action for Libel' (1948) 34 Virginia L Rev 867, fn 41. The French right of reply is considered in Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, VB.

³¹ Ibid, 885.

³² Out of the twenty-three jurisdictions which regulate defamation as a criminal wrong in the European Union, only three (France included) have abolished imprisonment penalties. See above, n 10.

³³ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VB.

³⁴ René David, *Les Grands Systèmes de Droit Contemporains* (Dalloz 1966).

these families according to ‘style’³⁵ to more complex ones nowadays labelled ‘legal cultures’ or ‘legal traditions’.³⁶ Whichever the model, the common and civil law have constantly been differentiated (although to varying degrees).³⁷

The question of the comparability of laws within two different families is debated, with some authors arguing that a meaningful comparison can only be intra-cultural.³⁸ The common and the civil legal systems have traditionally been starkly distinguished, generating various clichés that are nowadays entrenched in the minds of non-comparatists.³⁹ It is undeniable that the English and the French legal systems, which are emblematic of such a distinction, present great differences. Perhaps the major one is embodied in the fact that English law uses cases to develop and modernise legal principles; whereas in France legal principles are determined and codified by the legislator, and the case-law merely applies such codified rules.⁴⁰

In spite of the primary opposition of the English and French legal systems, a measure of similarity can be found between both; their differences are often exaggerated at both the doctrinal and the practical level.⁴¹ Although various other practical obstacles to a useful comparison have been pointed out by the

³⁵ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press; OUP 1998), 63ff.

³⁶ Glenn (n 12). Glenn’s legal traditions have sometimes been interpreted as marking a return to David’s main ideas.

³⁷ René David identified as one of the main families of law the ‘Western Laws’, within which he distinguished Romano-Germanic and Anglo-Saxon laws. Zweigert and Kötz distinguish the Roman, German and Common law styles. Glenn distinguishes the Civil and the Common law traditions.

³⁸ Mark Van Hoecke and Mark Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 ICLQ 495, 509.

³⁹ On a discussion on the myths surrounding the common and the civil legal systems, see Markesinis, ‘The Destructive and Constructive Role of the Comparative Lawyer’ (n 24).

⁴⁰ A better formulation would be: ‘is said to merely apply’. Although French judges officially only apply the law, the practice shows that to some extent, ‘*le juge est également créateur de droit*’. See, for instance: Sadok Belaid, *Essai sur le Pouvoir Créateur et Normatif du Juge* (LGDJ 1974).

⁴¹ On the convergence of common and civil law systems, see: Basil Markesinis, ‘Learning From and Learning In Europe’ in Basil Markesinis (ed), *Foreign law and comparative methodology : a subject and a thesis* (Hart Pub 1997), 191ff. One finds that both positions (the convergence and the divergence of the common and civil law systems) can be and are, in fact, defended in doctrinal works.

doctrine,⁴² they are of little relevance for this particular project. Language is not a barrier,⁴³ with no necessity to rely on second-hand materials; the study does not engage with the difficult issues surrounding legal transplants; and the wrong of defamation presents direct conceptual parallels between both jurisdictions, as will be seen throughout the study. The English and the French legal systems are undoubtedly different, but this cannot in and of itself present a sound obstacle for the comparatist. It provides an opportunity for a more interesting (if more challenging)⁴⁴ comparison.

C. The comparability of the English and French laws of defamation

Favouring the macro-comparison of laws, Van Hoecke and Warrington criticise comparative projects that concentrate on rule-comparison – such as this one –, for their lack of scientific value.⁴⁵ Their position is a bold one,⁴⁶ which utterly disregards the objectives of the micro-comparison. The general value of micro-comparison of laws will not be discussed; the above-mentioned goal of this project⁴⁷ also establishes its value.

A more fundamental issue that this project faces with regards to the comparability of defamation laws in England and France is their classification under different branches of the law – respectively tort and criminal law. Complex theoretical issues, regarding the interrelationship of tort and crime, linger under the surface. However, whether this affects the overall comparability of the subject matter of defamation is disputable. Just as one can oppose the arguments

⁴² Jane Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation' (2007) 1 JTL 30.

⁴³ Except to the extent that terminology can arguably create barriers of communication across legal traditions. See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, I.

⁴⁴ On the obstacles to an accurate comparison, see: Alan Watson, *Legal Transplants: an Approach to Comparative Law* (2nd edn, University of Georgia Press 1993), 10-15.

⁴⁵ Van Hoecke and Warrington (n 38), 509.

⁴⁶ I can only agree with Michael Bogdan, who 'finds the scientific comparison between legal rules belonging to different legal systems to be of such obvious value and use that it is almost embarrassing having to defend it.' See: Michael Bogdan, 'On the Value and Method of Rule-Comparison in Comparative Law' in Heinz-Peter Mansel *et al* (eds), *Festschrift für Erik Jayme* (Sellier 2004), 1235.

⁴⁷ See above, II.

raised in favour of an intra-cultural comparison, one can oppose the impossibility of comparing legal rules belonging to different areas of law. Comparability does not depend on a theoretical classification within one or the other branch of the law; this argument is particularly doubtful with regards to the English and French laws of defamation when the current classification happens to be the result of an erratic historical development.⁴⁸ Various doctrinal reflections on comparability point to the legal institution's structure, function, content and result.⁴⁹ The English and French rules on defamation present a great deal of similarities in that respect: both protect the reputation of persons as what will be termed a primary interest.⁵⁰ In spite of their classification under different areas of the law, the functional overlap of the English and French rules thus establishes their comparability.

IV. Theoretical method

The existence of a comparative law methodology has long been doubted. Half a century ago, the tendency was to deny its existence – either because the methodology used was found not to differ from those generally used in the sciences⁵¹ or because it was identical to that used by jurists analysing national laws.⁵² This debate was linked to a more general question regarding the existence of comparative law as a science.⁵³ Now that the legitimacy of the field and the existence of, and the need for, a comparative methodology have been established, there is a considerable amount of doctrinal discussion on the appropriate comparative methodology.

⁴⁸ See Chapter 2: The framework of defamation liability in comparative historical perspective, II, III.

⁴⁹ To cite but one author: Léontin Jean Constantinesco, *Traité de Droit Comparé*, vol 2. La méthode comparative (LGDJ 1974).

⁵⁰ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, III, IV.

⁵¹ Constantinesco (n 49), 229, making an analogy between the comparatist and the engineer.

⁵² Ibid, 240.

⁵³ Béatrice Jaluzot, 'Méthodologie du Droit Comparé: Bilan et Prospective' (2005) 57 RIDC 29, 44.

Although there are countless forms of comparative methodology,⁵⁴ the current scholarship can mostly be classified into two categories: rule-comparison (epitomised by the functional method) and the contextual approach (exemplified by Legrand's 'law as culture'). Functionalism, in its original Rabelian form, focused on rules and institutions, analysing their similarities and sometimes differences.⁵⁵ In its accomplished form, as developed by Zweigert and Kötz, the functionalist method goes even further, and establishes a presumption of similarity between laws.⁵⁶ The functionalist premise – that all societies face similar social problems⁵⁷ – is a good starting point for a comparative project, and rule-comparison is useful in that it provides the comparatist with an actual practical methodology. However, grounds for criticism are numerous. The major ones are found in the presumption of similarity between laws, when such a necessary convergence does not have a sound legal basis; the requirement for an objective comparison, when the comparatist necessarily approaches a project with his own preconceptions; and an evaluation process as the end result of the comparative research, which raises complex issues about the legitimacy (and consequently, the usefulness) of such an evaluation.

By contrast, Legrand's idea of law as culture lies in a comparative analysis of laws focusing on the structures of the law, on differences between the laws and on the general context surrounding the law. Legrand's approach overcomes some issues found in the rule-comparison method – it acknowledges the comparatist's subjectivity, questions the evaluation process and seeks to understand law-in-context, by looking not only at law-as-text but also at its overall epistemological framework. However, Legrand falls into another kind of excess. First, the theory of traces analyses the legal text (the 'visible') as the tip of the iceberg, with an

⁵⁴ On the conceptual method: Basil Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis* (Hart Pub 1997), 4-5. On the functional method: H C Gutteridge, *Comparative Law: an Introduction to the Comparative Method of Legal Study & Research* (University Press 1946); Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*. On the factual method: Rodolfo Sacco, *La comparaison juridique au service de la connaissance du droit* (Economica 1991). On the contextual/cultural method: Pierre Legrand, 'Paradoxically, Derrida: For a Comparative Legal Studies' (2005) 27 *Cardozo L Rev* 631.

⁵⁵ On the history of the functionalist method: Michele Graziadei, 'The Functionalist Heritage' in Pierre Legrand (ed), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003).

⁵⁶ Zweigert and Kötz (n 54), 39-40.

⁵⁷ *Ibid*, 34.

infinite number of unique traces (the ‘invisible’) inscribing the text in the world.⁵⁸ This analysis tends to excessively relegate law-as-text to the background, in favour of a variety of contextual and cultural elements. Second, his sound criticism of Zweigert and Kötz’s presumption of similarity paradoxically inverts the paradigm. Although he denies it,⁵⁹ his writings ultimately appear to advocate the search for alterity in law.⁶⁰

Building on the idea of methodological pluralism,⁶¹ this project departs from the traditional dichotomy of rule-comparison and law-in-context in order to apply a composite methodology. The comparison starts with the premise that England and France face a similar social problem, which they regulate through their laws on defamation. Abandoning rule-comparison’s search for similarities, the question is reframed in the following terms: what exactly can the comparatist find? In doing so, the project rejects a positivistic approach in favour of one striving to ‘understand how foreign legal communities think about the law, why they think about the law as they do, why they would find it difficult to think about the law in any other way, and how their thought differs from ours’.⁶² Where relevant, historical and social considerations will be referred to.

Each chapter will offer a juxtaposition of specific parts of the English and French laws of defamation, identify their similarities and differences, and analyse them by identifying their *raison d’être* and their value in the given legal system. How are the legal categories constructed in each jurisdiction? Are the philosophical perspectives that the English and French legal systems adopt on defamation comparable? These are some of the questions that will be considered. Ultimately, this analytical project will offer an evaluation of the comparability of the English and French laws of defamation, rather than a ‘better law’ appraisal.

⁵⁸ Pierre Legrand, ‘Siting Foreign Law: How Derrida Can Help’ (2011) 21 Duke J Comp & Int’l L 595, 606-09.

⁵⁹ Ibid, 612-13.

⁶⁰ See: Pierre Legrand, ‘La Comparaison des Droits Expliquée à Mes Étudiants’ in Pierre Legrand (ed), *Comparer les Droits, Résolument* (PUF 2009).

⁶¹ Ralf Michaels, ‘The Functional Method of Comparative Law’ in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006); Vernon Valentine Palmer, ‘From Leretholi to Lando: Some Examples of Comparative Law Methodology’ (2005) 53 AJCL 261.

⁶² Legrand, ‘Paradoxically, Derrida’ (n 54), 707.

V. The aspects of defamation law examined in this thesis

This thesis assesses the influence of the nature of the regulation on the substantive content of the rules on defamation in England and France by examining four main issues that follow the general structure of the law of wrongs. In turn, it considers: the framework of liability, the standard of liability, the defence of truth, and the remedial aspects of defamation. The main reason for choosing to focus on these features is that they misleadingly appear to result from each jurisdiction's distinct regulatory features, when in fact the link between the nature of the regulation and the substantive rules is not as evident or persistent as might originally have been thought.

A. Justifying the four points of comparison

At first sight, the way in which each jurisdiction approaches these features seems to be justifiable on the basis of their disparate regulatory features. Their interest for this thesis lies in the fact that contrary to this, on closer analysis the link between the type of liability – tortious or criminal – and the substantive content of the rules is challenged.

The distinction between oral and written defamation can be explained by reference to the existence of two types of regulation – one tortious and one criminal –, and of the influence of one over the other.⁶³ The standards of liability – strict liability in England, intention in France – reflect standards commonly found in tort and criminal law.⁶⁴ The traditional rules on truth – that it justifies *per se* in England, but only with an added element of public benefit in France –

⁶³ Chapter 2: The framework of defamation liability in comparative historical perspective, IVA.

⁶⁴ Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, II.

echo the objectives of tortious and criminal liability.⁶⁵ The English remedies and French penalties are directly prescribed by nature of their regulation.⁶⁶

But a more precise analysis reveals that this link is not as strong as has originally been suggested. The consideration of the framework of liability is useful to understand how the wrong is conceptualised in each country. The justifications for choosing tortious or criminal liability, and for distinguishing (or not) between written and oral defamation give important indications as to the comparability of the English and French wrongs. A conscious and reasoned choice might reveal fundamentally different approaches to the right to reputation; on the contrary, what I argue to be the result of a haphazard development with lasting consequences might suggest that more common grounds can be uncovered.⁶⁷

Indeed, commonalities emerge when considering the remaining three features – standards of liability, the defence of truth and remedial aspects of defamation. An analysis of the historical evolution of these rules and of some recent developments in the law of defamation suggests that the existence of a link between the nature of the regulation and the content of the rules is at the very least nuanced,⁶⁸ if not ultimately denied.⁶⁹

B. Explaining the exclusion of privilege

The main reason for which privilege⁷⁰ is excluded from the scope of this thesis is that neither the similarity between absolute privilege and the French *immunités*

⁶⁵ Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IIIA.

⁶⁶ Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, II.

⁶⁷ Note, however, that the fact that one system has evolved haphazardly does not automatically imply that it is likely to have moved more in line with other systems. Sometimes haphazard developments could lead to different outcomes and, conversely, there might be conscious choices to imitate other systems.

⁶⁸ Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, III.

⁶⁹ Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIIC; Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IIIB, IIIC.

⁷⁰ The privilege in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, [1999] 4 All ER 609 is not considered in this discussion. The reason for this is that while it is historically rooted in the

(privileges) of article 41 of the law of 29 July 1881, which regulates defamation, nor the disparity in the English and French approaches to qualified privilege can be rationalised on the basis of their distinct regulatory features.

The publication of a defamatory statement is absolutely privileged in those instances in which the dissemination of the information it contains is considered to trump the protection of the right to reputation. The doctrine of absolute privilege is distinctly similar in England and France. In both systems it focuses on the protection of parliamentary and judicial proceedings, and of statements made in pursuance of the state's executive power.⁷¹ Further, in both systems absolute privilege is mistakenly justified on the basis, or approached through the lens of, the doctrine of good faith.⁷² So the theoretical background and practical application of the English absolute privilege and French *immunités* are largely similar. However, nothing suggests that this state of affairs has anything to do with the tortious or criminal regulatory features of the English and French laws of defamation. Rather, they likely represent a shared 'classification device',⁷³ the effect of which is to render the law of defamation inapplicable to certain sets of facts. As such, they do not warrant substantial examination in this thesis.

From a comparative perspective, the English doctrine of qualified privilege is rather more interesting. Its development is closely bound up with the notion of malice, which will be analysed in depth in Chapter 3. For present purposes, it is sufficient to note that by the 18th century the accepted principle was that the publication of a defamatory statement gave rise to a presumption of malice. The doctrine of qualified privilege provided that in defined circumstances, the context in which a defamatory statement was published would displace this presumption

defence of qualified privilege, it later adopted a different perspective. The *Reynolds* privilege did not consider the occasion in which the statement was published, but rather the contents of the statement.

⁷¹ In England, see generally: Parkes *et al* (n 2), Chapter 13. In France, see art. 41 *alinéas* 1 and 2 (for parliamentary and judicial proceedings), and the general defence in art. 122-4 *alinéa* 2 of the Criminal code for the statements made in pursuance of the state's executive power, according to which 'A person is not criminally liable who performs an action commanded by a lawful authority, unless the action is manifestly unlawful.'

⁷² Indeed, in France the protection of art. 41 is subject to the defendant having acted in good faith. This approach is also seen in some English cases: see generally Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Pub 2005), Chapter 9.

⁷³ *Ibid*, 231.

of malice. The burden would then be on the claimant to positively prove the defendant's malice in order for liability to arise. Broadly speaking, the circumstances in which the modern doctrine of qualified privilege arises can be divided into two categories. The first category includes situations in which a special relationship exists as between the claimant and the defendant in relation to the information contained in the statement. Consequently, the defendant makes the statement in discharge of a duty and the claimant has an interest in hearing the statement, the prime example being that of employment references.⁷⁴ The second category, expanded in the Defamation Act 2013, covers various types of reports.⁷⁵

There is no equivalent doctrine to that of qualified privilege in the French law of defamation. That this is a gap in the French approach has been recognised by Lécuyer,⁷⁶ and has led to a level of protection being afforded through other (perhaps less fitting) doctrines such as the defence of *bonne foi* (good faith).⁷⁷ However, contrary to the four issues that this thesis focuses on, there is nothing to suggest that this discrepancy as between the English and the French laws of defamation can be rationalised on the basis of their distinct regulatory features. Indeed, Lécuyer's argument is not restricted to the law of defamation, the law of 29 July 1881, or for that matter the criminal law. His argument is that the effect of some legal provisions – whether civil or criminal – is to unduly limit the right to freedom of expression in situations in which it is used in pursuance of a higher interest. This is the dual effect of article 41 of the law on the press, which establishes categories of privileged statements and simultaneously excludes the extension of this protection to other statements not listed in article 41. Further, there are no indications that the development of the doctrine of qualified privilege in English law is linked in any way to the tortious nature of the

⁷⁴ It is in fact in the context of employment references that the doctrine of qualified privilege was first developed. On the antecedents to qualified privilege, see Mitchell (n 72), 146ff.

⁷⁵ On privileged reports at common law: see Parkes *et al* (n 2), 15.34ff; this category was expanded in s. 7(9) of the Defamation Act 2013.

⁷⁶ Guillaume Lécuyer, *Liberté d'Expression et Responsabilité* (Daloz 2006), 292ff.

⁷⁷ For instance, the doctrine of *bonne foi* protects statements made in scientific or academic journals (Emmanuel Dreyer, *Responsabilités Civile et Pénale des Médias: Presse, Télévision, Internet* (3rd edn, LexisNexis, Litec 2011), 585ff), whereas in England the effect of s. 6 of the Defamation Act 2013 is that this protection would be afforded under the doctrine of qualified privilege.

regulation.⁷⁸ Because the purpose of this thesis is to explore the link between the nature of the regulation – tortious or criminal – and the substantive content of the rules, a comparative analysis of the doctrine of qualified privilege falls outside of its scope.

VI. Outline of the thesis

The thesis is divided into five chapters. Chapter 1 is a preliminary chapter, which defines the subject matter of the study and delimits its scope. It characterises the wrong of defamation as the violation of one's personal right to reputation, examines the four main modes of protecting reputation and considers the various causes of action providing this protection in English and French law. The ambit of the study is then delimited by reference to the scope of the English tort and the French criminal wrong of defamation. This is because historically, the English tort was the only cause of action that protected reputation in what will be labelled a 'right-constituting' way, and the French wrong had a foundational role in protecting reputation. The chapter concludes by giving an overview of the English and French laws of defamation, and outlining the main distinguishing traits of tortious and criminal liability.

Having laid the foundations of the study in the opening chapter, Chapters 2 to 5 engage in the comparative analysis. Chapter 2 addresses the question of the framework of liability. In this context, the 'framework of liability' refers to the nature of the liability (tortious or criminal), the internal structure of the wrong and its position on the national legal maps. It begins by a consideration of the historical evolution of defamation liability in England and France, analysing the justifications for imposing tortious and criminal liability respectively. This choice is rationalised on the basis of path dependence, in particular owing to the internal characteristics of the common law and civilian legal traditions. Having addressed the rationale for the distinct natures of the regulation, the focus switches to the impact of this disparate regulatory structure on the doctrinal

⁷⁸ Indeed, the defence applied to criminal libel 'to the same extent and in like manner... as it applies to the tort' (Law Commission, *Working Paper No. 84, Criminal Libel* (1982), 3.20).

conceptualisation of the wrong in each system. The chapter suggests that the nature of the regulation has had a limited effect on the rest of the framework of liability. Specifically, it denies that these regulatory features could explain the existence (or absence) of a sub-division of the wrong into oral and written defamation. To the contrary, it identifies distinct signs of convergence in the frameworks of defamation liability in England and France. It concludes by noting that the current regulatory features are the result of a haphazard historical development, rather than of a conscious choice. Thus, the distinction between tortious and criminal liability in England and France does not necessarily epitomise fundamentally irreconcilable conceptions of reputation.

The following chapters substantiate this argument by challenging the strength (or continued existence) of the link between the regulatory features of each system and their substantive rules, and by identifying a shared conceptual approach to key aspects of the wrong of defamation in England and France. Chapter 3 considers the standards of liability in the English tort and French criminal wrong of defamation. At first sight, the applicable standards – strict liability in England, intention in France – are in line with the general rules on fault in tort and criminal law. However, the chapter argues that adherence to these standards is not strict, and that each system in fact relies on notions of fault that are extraneous to their chosen type of regulation. Further, a comparison reflecting the hierarchical lines along which responsibility for defamation is organised in each jurisdiction unveils shared standards of liability. These are rationalised on the basis of another facet of path dependency, whereby similar societal factors led to the development of similar rules in both jurisdictions. The chapter therefore reveals an enduring shared approach to the standards of liability in England and France.

Chapter 4 examines the treatment of the defence of truth. Its historical evolution suggests that in theory, the way in which it is approached should be dictated by each system's regulatory features. It will be argued that in tort, a recognised public policy principle considers the exposure of truth as the paramount interest, superior to that in protecting reputation. Consequently, liability only arises in relation to the publication of statements which cannot be proved to be true. By

contrast, criminal law's focus on maintaining the public peace commands that the truth or falsity of the statement be disregarded. This approach is contrasted with the modern rules: 20th century and more recent case law developments suggest that the French law of defamation has gradually embraced the English treatment of truth following the disappearance of the violent practices leading to breaches of the public peace. The chapter goes further and positively establishes the existence of a common approach to truth. It identifies a shared underlying value system justifying that truth be treated as a defence, with limitations pursuing a common goal of promoting social cohesion through the protection of privacy interests.

Chapter 5 discusses the remedial aspects of defamation proceedings. One of the fundamental distinguishing traits of tortious and criminal liability identified in Chapter 1 is that the response to the defendant's wrong differs. The type of defamation sanctions available in each system are linked to the nature of the regulation: English law responds with tortious remedies; French law with criminal penalties. Yet, despite such marked differences, the chapter identifies a common spirit in the responses to defamation claims. The English and French sanctions are argued to be functionally comparable, implementing both tortious and criminal remedial goals. Thus, England and France approach the remedial aspects of defamation in a comparable way, and the link between each jurisdiction's regulatory features and their responses to the wrong is not as strong as was originally thought. The result is the development of a shared hybrid model of liability, which draws on tortious and criminal principles. Its origin is found in a lack of reflection around the modes of protecting reputation identified in Chapter 1. A renewed analysis of these modes of protection suggests that only two of them should be retained. The chapter concludes by analysing the practical consequences of this finding which, if implemented, would align the English and the French remedial aspects of defamation.

Finally, the concluding chapter brings together the analysis in the preceding chapters to illustrate the shared conceptual approach in the English and French laws of defamation, despite the substantive differences owing to the regulatory features of each system. Linking back to the practical significance of the research

identified above, the chapter identifies two main consequences to this finding of comparability. The first is the necessity for a renewed debate on the decriminalisation of French defamation law, based on the societal changes identified in the previous chapter and on the related gradual privatisation of the French wrong. The second is a direct challenge to the perceived heterogeneity of national defamation laws, which provides a new angle to the debate on the feasibility of substantive harmonisation of the laws of defamation in the European Union.

CHAPTER 1

THE MODERN LAW OF WRONGS AGAINST REPUTATION: AN

OVERVIEW AND INTRODUCTION TO THE TORT/CRIME

DISTINCTION

I. Introduction

Some of the main challenges of comparative research lie in terminology and language, which arguably create barriers of communication across legal traditions.¹ A comparative analysis of law must therefore resist the ‘reductionist urge’² to confine the comparison to elements of sameness in the formulation of concepts and statutes. Indeed, the existence of commonalities at the most superficial level may be deceptive. Specific concepts may cover slightly different grounds; for example, the scope of defamation in English law differs from that of *diffamation* in French law. The use of the English language throughout the thesis exacerbates this risk by referring to ‘defamation’ in relation to both English and French law.

This chapter gives an overview of the protection of reputation in English and French tort and criminal law prior to the in-depth comparative analysis. Its purpose is both explanatory and delimitational. It starts by reflecting on the nature of reputation and the mechanisms through which it is afforded legal protection. It then presents the various causes of action protecting reputation in English and French law. On the basis of considerations grounded in the historical development and fundamental importance of the wrong of defamation, it limits the scope of the thesis to that of the English and the French laws of defamation (as opposed to other related wrongs). The chapter concludes by giving a brief outline of the modern laws of defamation in England and France, and by

¹ Pierre Legrand, ‘Public Law, Europeanisation and Convergence: Can Comparatists Contribute’ in P R Beaumont *et al* (eds), *Convergence and Divergence in European Public Law* (Hart Pub 2002), 228.

² *Ibid*, 225.

summarising the fundamental distinguishing traits of tortious and criminal liability.

II. Unpacking the concept of reputation

Defamation was presented in the Introduction as balancing freedom of expression and the right to reputation.³ The fundamental importance of the right to freedom of expression, protected in article 10 of the European Convention on Human Rights (ECHR), is well established. Following section 12 of the Human Rights Act 1998 (HRA), which introduced the rights and freedoms of the ECHR into domestic law, a court ‘considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression’⁴ ‘must have particular regard to the importance’ of that right.⁵ In this context, since the protection of reputation is a justification for a restriction freedom of expression,⁶ it is necessary to reflect on the nature of reputation and on the modes of protecting it.

The nature of reputation has long remained under-analysed (and is still so in France). In recent years, however, a number of significant doctrinal works have engaged in an in-depth analysis of the nature of the right that is protected by the common law of defamation.⁷ In his seminal article published in the 1986 issue of the California Law Review, Post identified three concepts (or constructs) of reputation: property, honour and dignity. More recently, Howarth has

³ Introduction, I.

⁴ S. 12(1) of the HRA.

⁵ S. 12(4) of the HRA.

⁶ Art. 10(2) of the ECHR.

⁷ Robert C Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 Cal L Rev 691; Robert N Bellah, ‘The Meaning of Reputation in American Society’ (1986) 74 Cal L Rev 743; David A Anderson, ‘Rethinking Defamation’ (2006) 48 Arizona L Rev 1047; Lawrence McNamara, *Reputation and Defamation* (OUP 2007); Robert N Bellah, ‘The Meaning of Reputation in American Society’; David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate 2008); David Howarth, ‘Libel: Its Purpose and Reform’ (2011) 74 MLR 845; Laura A Heymann, ‘The Law of Reputation and the Interest of the Audience’ (2011) 52 B C L Rev 1341; Dean Spielmann and Leto Carioulou, ‘The Right to Protection of Reputation Under the European Convention on Human Rights’ in Dean Spielmann *et al* (eds), *The European Convention on Human Rights, a living instrument: Essays in Honour of Christos L Rozakis* (Bruylant 2011); Tanya Aplin and Jason Bosland, ‘The Uncertain Landscape of Article 8 of the ECHR: the Protection of Reputation as a Fundamental Right?’ in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP), forthcoming.

reconsidered the nature of reputation and consequently suggested a fourth construct: sociality. These constructs of reputation are analytic tools for understanding the law of defamation; they are best understood as describing distinct modes of protecting reputation. In what follows, I summarise the main theoretical modes of protecting reputation, and adhere to Howarth's view, with some reservations.

A. Four modes of protecting reputation

The first concept of reputation which Post considers is an economic construct: reputation as property. He theorises reputation as a good, acquired through one's labour. This good, akin to goodwill, possesses a value in the marketplace and is therefore capable of pecuniary assessment. Examples are 'the merchant who works hard to become known as creditworthy or ... the carpenter who strives to achieve a name for quality workmanship'.⁸ However, this concept of reputation is equally applicable to private individuals whose reputation is also the fruit of their 'personal exertion'.⁹ When approaching reputation as property, the primary mode of protection of reputation is therefore to compensate the defamed claimant's economic losses. This reflects the origins of the tort in the action on the case for words, the aim of which was to award damages for actual (or, in the terminology then in use, 'temporal') losses stemming from the injury to reputation.¹⁰

Post's second concept of reputation is that of honour, which he defines as 'a form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role.'¹¹ This type of reputation is not earned but rather endowed to the individual by virtue of his social status. It therefore rests on a fundamentally unequal conception of society. Reputation is protected through the restoration of the individual's status. Post

⁸ Post (n 7), 693.

⁹ Ibid, 694-95.

¹⁰ Ibid, 695; Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Pub 2005), 23.

¹¹ Post (n 7), 699-700.

labels such a restorative process ‘vindication’. In this context, the concept of vindication is grounded in ideas of vengeance and punishment.¹² Under the honour construct of reputation, an important concern is to therefore preserve social harmony.¹³ This harmony might be disrupted by the practice of duelling, which was a common private response to defamatory statements until the mid-19th century.¹⁴ Thus, it justifies that reputation be protected by punishing the defendant defamer, the ultimate goal of the punishment being to preserve the public peace.

Finally, Post proposes a dignity construct of defamation. He defines dignity as ‘the respect (and self-respect) that arises from full membership in society’.¹⁵ It is a fundamentally private attribute of the individual, inherent in every person by virtue of his or her existence. Mullis and Scott, building on this analysis, rationalise reputation as an aspect of dignity on the basis of the ‘looking-glass self’ theory. This theory approaches the dignity construct of reputation in its association with the concept of psychological integrity.¹⁶ According to it, violations of the right to reputation can impact an aspect of the individual’s psychological integrity – their self-esteem (or self-worth in Mullis and Scott’s terminology).¹⁷ Aplin and Bosland acknowledge that the ‘looking-glass self’ theory is criticised for giving too much weight to external evaluations in the individual’s pursuit of self-esteem. Nevertheless, they contend that despite these critiques there is value in protecting self-esteem through the law of defamation, so that the dignity justification should not be dismissed.¹⁸ So, a third mode of protecting reputation is to compensate the defamed claimant’s injured feelings.

¹² John Simpson and Edmund Weiner (eds), *The Oxford English Dictionary* (OUP 1989), ‘Vindication’: ‘a. The action of avenging or revenging. b. Retribution, punishment.’ As will be seen below, vindication acquires a different meaning in relation to the sociality construct of reputation.

¹³ Guillaume Lécuyer, *Liberté d'Expression et Responsabilité* (Daloz 2006), 67.

¹⁴ Mitchell (n 10), 66. The practice of duelling survived for a longer period of time in France: see Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IVA, fn 126.

¹⁵ Post (n 7), 711.

¹⁶ Alastair Mullis and Andrew Scott, ‘The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law’ (2012) 63 NILQ 27, 39.

¹⁷ Alastair Mullis and Andrew Scott, ‘Reframing Libel: taking (all) rights seriously and where it leads’ (2012) 63 NILQ 5, 10; also in this sense: Mullis and Scott, ‘The Swing of the Pendulum’ (n 16), 41.

¹⁸ Aplin and Bosland (n 7), forthcoming.

Widespread criticism of Post's three constructs of reputation¹⁹ prompted Howarth to suggest a fourth construct: that of sociality.²⁰ Under this view, defamation is a social wrong, interfering with the interests of society at large; at its core is the individual in relation to the community, understood as a social construct. Thus, the law of defamation protects two kinds of interests, flowing from the individual's inclusion or exclusion from such community: first, the individual's interest in being part of the community; second, the community's interest as a whole in achieving and maintaining social cohesion.²¹ Reputation is protected because it partakes in a person's ability to associate with other people, the protection of which is important both from a private and public perspective:

‘The individual pain caused by a threat to sociality might be a private matter, but the functioning of human groups and networks is important to the welfare of all of their members, not just to those threatened with exclusion.’²²

So a fourth and final mode of protecting reputation is to vindicate the defamed claimant's good name, the ultimate goal of the vindication being to promote social cohesion. The concept of vindication is used in a different way in relation to the sociality construct than in relation to the honour construct of reputation. In relation to the sociality construct, it is not grounded in ideas of vengeance and punishment. Rather, it captures the communicative element necessary to restore the plaintiff's name by convincing the public of the baselessness of the charge. This mechanism is designed to restore the defamed claimant's ability to associate with other people.

¹⁹ See below, IIB.

²⁰ See generally: Howarth (n 7). This view had already been defended by Bellah (n 7), 743: ‘reputation... is a relation between persons’.

²¹ Again, this echoes Bellah's arguments: see Bellah (n 7), 744-45: reputation is ‘a public good, not merely a private possession.’

²² Howarth (n 7), 859.

B. Rationalising the protection of reputation

Post's account of defamation has come under heavy criticism. The property concept of reputation is alleged to reflect the views of judges at a given point in time – specifically, the 19th century –, and to lack support in contemporary judicial approaches.²³ The continued relevance of the honour construct of reputation is doubted, with some authors arguing that the non-egalitarian conception of society underlying the concept of reputation as honour is outmoded.²⁴ They submit that the concept of honour has been gradually replaced by that of dignity, which is more in line with the modern concept of equality.²⁵ Yet there are two problems with the dignity construct of reputation. First, the concept of dignity is inherently uncertain, and its definition is vague.²⁶ Second, the 'looking-glass self' theory cannot be reconciled with the general principles of tort law. This view, which endorses an argument developed by Descheemaeker,²⁷ will be further developed in Chapter 5.²⁸ For present purposes, it is sufficient to note that compensating the claimant's feelings ('internal' interests) runs against the general approach in English tort law, which is to compensate the injury to the claimant's 'external' interests (in this case, the injury to reputation).

This has prompted authors to either suggest a new approach (as is the case in relation to Howarth's sociality account) or to only adhere to some (one, or at best

²³ Rolph (n 7), 22.

²⁴ Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 CLP 110, 116; Howarth (n 7), 852.

²⁵ For a summary of the common law literature on this issue, see: Rolph (n 7), 27. A similar argument is made in France: see Emmanuel Dreyer, *JCl. Communication*, Fasc. n°3740, 66. For instance in France, while the wording of art. 29 was not amended, *honneur* (honour, which is one of the interests officially protected by the wrongs of art. 29, including defamation) is now merely seen as an aspect of dignity. In this sense: Emmanuel Dreyer, *JCl. Lois pénales spéciales*, Fasc. n°80, 24. Many textbooks in fact classify the wrong of defamation under the general heading of wrongful interference with the right to dignity. See, for instance: Michel Véron, *Droit Pénal Spécial* (12th edn, Dalloz 2008), 234ff; J Pradel and M Danti-Juan, *Droit Pénal Spécial* (5th edn, LGDJ 2010), 393ff.

²⁶ See, discussing the vagueness of the concept of dignity: Denise G Réaume, 'Indignities: Making a Place for Dignity in Modern Legal Thought' (2002) 28 Queen's LJ 61. In fact, prior to advancing their own theory of reputation as dignity, Mullis and Scott have argued that Post's dignity construct of reputation 'is at once everything and nothing' (Mullis and Scott, 'The Swing of the Pendulum' (n 16), 38).

²⁷ Eric Descheemaeker, 'Solatium and Injury to Feelings: Roman law, English law and Modern Tort Theory' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law* (Hart Pub 2013).

²⁸ Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, IVC.

two) of the four main modes of protecting reputation summarised above. What will be argued in this thesis is that all of the above-mentioned modes of protection are currently relevant, and that both England and France recognise all of what I will argue to be their associated remedial goals.²⁹ However, they have been balanced differently across jurisdictions.³⁰ It will be further suggested, endorsing Howarth's view, that the vindication of the claimant's good name should be recognised as *the* dominant mode of protecting reputation.³¹ However, departing from Howarth's argument, it will not be envisaged in isolation; I will argue that compensation of economic losses should still act as a secondary mode of protection.³² On the other hand, the protection of reputation through punishment of breaches to the public peace and compensation of injured feelings should be abandoned.³³ The argument made in the thesis is therefore that there are two appropriate modes of protecting reputation: first, through vindication of the claimant's good name; second, through compensation of economic losses.³⁴

III. The protection of the right to reputation in English law

Having considered the modes of protecting reputation, I now turn to an analysis of the existing causes of action protecting reputation.

A. Wrongs protecting reputation

McBride and Bagshaw consider that 'the function of tort law is to determine what legal rights we have against other people, ... and what remedies will be available when those rights are violated'.³⁵ Indeed, one of the most prominent

²⁹ Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, IVA.

³⁰ Ibid, III.

³¹ Ibid, IVD.

³² Ibid.

³³ Ibid, IVB, IVC.

³⁴ This argument is made only in the context of the law of defamation, i.e. in a cause of action which protects reputation in what will be referred to in section III as a 'right-constituting' way.

³⁵ Nicholas J McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012), 1. See also: Tony Honoré, 'The Morality of Tort Law - Questions and Answers' in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1995), 75: 'One point of creating a tort ... is to define and give content to people's rights by providing them with a mechanism for protecting them and securing compensation if their rights are infringed'.

theories of tort law in England is Stevens' rights-based account of tort law.³⁶ He analyses a tort as a species of wrong, conceptualised as a breach of duty, itself characterised by the infringement of a right.³⁷

In line with Birks' characterisation of tort law as a 'tangle of crisscrossing categories',³⁸ it is clear that one tort may protect a wide range of interests.³⁹ Descheemaeker argues that not all these interests are protected in a 'right-constituting' way. In some cases, recovery is parasitic upon some other right violation.⁴⁰ He illustrates this argument by reference to the tort of defamation, which protects not only the interest in reputation but also other interests that are consequential to the injury to reputation.⁴¹ However, while the former is protected in a right-constituting way as a primary interest, the latter are only protected as secondary interests.⁴² Conversely, he notes that other torts protect the interest in reputation parasitically.⁴³ This chapter endorses this view. It uses the distinction between 'primary' and 'secondary' interests, and that between 'right-constituting' and not 'right-constituting' as analytical tools to consider the various heads of liability – civil or criminal – which overlap with defamation law, with particular reference to whether or not reputation is protected in a right-constituting way.

³⁶ Robert Stevens, *Torts and Rights* (OUP 2007).

³⁷ Ibid, 284ff.

³⁸ Peter Birks, 'Harassment and Hubris' (1997) 31 *Irish Jurist* 1, 32.

³⁹ Descheemaeker notes that the relationship between 'rights' and 'interests' is made difficult by the fact that these terms are commonly used interchangeably. However, a right can be conceived as the section of an interest that is protected by the law (in other words, that is actionable). As such, in relation to defamation, 'we never have a general right not to have our reputation violated. All legal systems are bound to accept that there are many situations where others have the right to impinge upon our reputation. What we normally mean when we speak of a "right to reputation" is not a right not to have our reputation infringed at all, but a right not to have it violated *in a wrongful manner*, that is to say, in a manner not permitted by the law. In that sense, it is better to speak of an "interest in reputation", which may or may not be protected by a right.' (See: Eric Descheemaeker, *The Division of Wrongs: a Historical Comparative Study* (OUP 2009), 28).

⁴⁰ Eric Descheemaeker, 'Protecting Reputation: Defamation and Negligence' (2009) 29 *OJLS* 603, 616.

⁴¹ Ibid, 615-16.

⁴² Ibid, 616.

⁴³ Ibid, 618 and 621-22.

1. Overlapping heads of civil liability

Malicious falsehood and wrongs protecting privacy interests are considered in detail because they most frequently and obviously overlap with defamation. However, various other tortious causes of action have also come to protect reputation; an outline of these heads of liability is given in the third sub-section.

a) Malicious falsehood

Malicious falsehood, which protects the claimant against the defendant's falsehoods causing him or her economic harm, is often used as an alternative cause of action to defamation. Its constituent elements are close to those of the tort of defamation, but in one respect it features a higher evidentiary hurdle. There does not exist a presumption of falsity as is the case in defamation, and the claimant must prove that the defendant acted maliciously. Consequently, a claim in malicious falsehood will only be preferred to one in defamation where there is a tactical reason to do so. Some such tactical reasons have included the wish to circumvent some rules applicable in the tort of defamation (including the offer of amends procedure⁴⁴ and the single meaning rule)⁴⁵ or the desire to benefit from the legal aid scheme, as illustrated in *Joyce v Sengupta*.⁴⁶ In this case, the claimant alleged that the defendant had written a 'grossly defamatory' article about her. In order to benefit from legal aid, which was not available in defamation proceedings, she brought her claim in the tort of malicious falsehood. While the first instance judge found for the defendant and held the claim to be an abuse of process, the appellate court allowed the appeal, thereby highlighting the overlap that exists between the two causes of action.

⁴⁴ *Tesco Stores Ltd v Guardian News & Media Ltd and Rusbridger* [2008] EWHC B14, [2009] EMLR 5.

⁴⁵ *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd (No 2)* [2010] EWCA Civ 609, [2010] 4 All ER 1029. See, expanding on this decision: *Cruddas v Calvert* [2015] EWCA Civ 171, [2015] All ER (D) 184.

⁴⁶ *Joyce v Sengupta* [1992] EWCA Civ 9, [1993] 1 WLR 337. Note that following s. 6(6) and Sch. 2 of the Access to Justice Act 1999, malicious falsehood can no longer be funded as part of the Community Legal Service.

In some cases, the two heads of liability have been assimilated, misleadingly obscuring their conceptual differences. In *Khodaparast v Shad*,⁴⁷ Stuart-Smith LJ considered that ‘malicious falsehood is a species of defamation’.⁴⁸ This is supported by the fact that in 1952, statutory intervention in relation to defamation also amended the common law tort of malicious falsehood.⁴⁹ However, the approximation of these torts is not opportune. In *Ajinomoto*,⁵⁰ Sedley LJ took the view that ‘the two are not so close as to be variants of a single tort, as libel and slander might be said to be.’⁵¹ Indeed, ‘both concern the protection of reputation, [but] one protects the reputation of persons and the other the reputation of property, typically in the form of the goodwill of a business.’⁵² So the primary purpose of malicious falsehood is to protect a person’s economic interests, vested in his property or trade. The protection of one’s individual reputation only benefits from an ancillary type of protection.

b) Privacy

The common law did not traditionally recognise a freestanding tort of invasion of privacy.⁵³ The equivalent protection would be obtained through other pre-existing causes of action, including defamation.⁵⁴ However, the law has evolved and nowadays protects privacy interests through common law and statutory mechanisms.

Since the Human Rights Act 1998 has come into force, English law has developed to give effect to its obligations under the European Convention on Human Rights. In order to actuate the article 8 right to respect for one’s private and family life, the law has recognised a new cause of action. The tort of misuse of private information protects the claimant’s reasonable expectation of privacy

⁴⁷ *Khodaparast v Shad* [2000] 1 All ER 545, [2000] 1 WLR 618.

⁴⁸ *Ibid*, [42].

⁴⁹ Defamation Act 1952, s. 3(1).

⁵⁰ See above, n 45.

⁵¹ *Ibid*, [30].

⁵² *Ibid*, [28].

⁵³ *Kaye v Robertson* [1991] FSR 62.

⁵⁴ See, e.g.: *Tolley v Fry* [1931] UKHL 1, [1931] AC 333.

in relation to information for which disclosure is threatened. This is balanced against the expression rights of others.⁵⁵

In many cases, claims in the tort of misuse of private information involve defamatory statements. Tugendhat J identified various types of cases illustrating this overlap in *Terry (previously 'LSN') v Persons Unknown*.⁵⁶ The only real overlap is found in cases 'where the information relates to conduct which is voluntary, discreditable, and personal ... but not unlawful'.⁵⁷ In those cases, the decision to bring a claim under one or the other cause of action can affect the outcome of the case.

'In defamation, if the defendant can prove one of the libel defences, he will not have to establish any public interest...^[58] But if it is the claimant's choice alone that determines that the only cause of action which the court may take into account is misuse of private information, then the defendant cannot succeed unless he establishes that it comes within the public interest exception'.⁵⁹

This has led some authors to characterise the tort of misuse of private information as an alternative to a claim in defamation.⁶⁰ Nevertheless, in practice the causes of action remain distinct from one another. Defamation focuses on harm to reputation caused by false statements. Falsity is irrelevant to the tort of misuse of private information,⁶¹ which rather focuses on harm caused by the dissemination of information about one's private life.⁶² Reputation is only protected through the tort of misuse of private information as a secondary interest.

⁵⁵ See: *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 WLR 992; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

⁵⁶ *Terry (previously 'LSN') v Persons Unknown* [2010] EWHC 119, [2010] EMLR 16, [96].

⁵⁷ *Ibid.*

⁵⁸ Except in the context of s. 15 of the Defamation Act 1996 and s. 4 of the Defamation Act 2013.

⁵⁹ *Terry* (n 56), [96].

⁶⁰ Richard Parkes *et al*, *Gatley on Libel and Slander* (Sweet & Maxwell 2013), 22.1.

⁶¹ *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 WLR 194, [80] per Buxton LJ: 'provided the matter complained of is by its nature such as to attract the law of breach of confidence, then the defendant cannot deprive the claimant of his article 8 protection simply by demonstrating that the matter is untrue'.

⁶² *Campbell* (n 55), [51].

Alongside the common law tort of misuse of private information, privacy rights are also given statutory protection through the Data Protection Act (DPA) 1998. The purpose of the Act is to protect privacy rights in relation to computerised and manual files. Compensation is awarded to the data subject who suffers damage as a result of the data being improperly or inaccurately used. While the scope of the Act is broader than that of the wrong of defamation, it may be relied on to bring claims in relation to defamatory materials. For instance, in *Hegglin v Persons Unknown*,⁶³ abusive and defamatory allegations had been posted on various websites. The claimant, a businessman and investor residing in Hong Kong, was applying for the information to be removed by Google under the provisions of the DPA. Considering the issue of jurisdiction, Bean J noted that the claimant had ‘business interests as well as a home within the jurisdiction [England], and [that] the defamatory material damaged or risked damaging his reputation here.’⁶⁴ The collateral effect of Bean J’s judgement granting permission to serve proceedings on Google under the DPA is therefore to protect Hegglin’s reputation against the defamatory statements outside of the traditional framework of defamation law. However, the primary focus of the proceedings is undoubtedly on the fair, lawful and accurate use of personal data. Again, reputation is only protected as a secondary interest.

c) Other civil heads of liability protecting reputation

The interest in reputation can also be protected under various other civil heads of liability. Sometimes, a claimant abusively pursues proceedings based on a cause of action whose predominant purpose is different from that for which the claim is brought. This may be struck out as an abuse of process, for instance if ‘a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation’.⁶⁵

⁶³ *Hegglin v Persons Unknown* [2014] EWHC 2808.

⁶⁴ *Ibid*, [19].

⁶⁵ *McKennitt* (n 61), [79].

However, reputation may receive some level of protection under other heads of civil liability without there being any misuse or perversion of the relevant cause of action. In some torts, harm to reputation is a direct consequence of the wrong. This can be the case in malicious prosecution⁶⁶ and in the tort of passing off.⁶⁷ But again, the protection of reputation is only collateral; the torts' respective primary goals are to promote due process and the reputation of property, in the form of the goodwill of a business.

Various other civil causes of action have come to protect reputation as a secondary interest, albeit less frequently. They treat reputation as an aggravating feature of the tort (as is the case in the tort of false imprisonment)⁶⁸ or as a type of consequential loss (for instance in the torts of conversion⁶⁹ and negligence).⁷⁰

Perhaps of most interest is a wrong connected with copyright. Copyright is traditionally regarded as a means of protecting the economic interests of creators

⁶⁶ In this sense, *Clark v Chief Constable of Cleveland Police* [1999] EWCA Civ 1357, [1999] All ER (D) 473, per Roch LJ: 'Compensation for malicious prosecution has three aspects. First, there is the damage to a person's reputation...' The interest of this tort for the collateral protection of reputation has recently been renewed. Indeed, the Privy Council extended its scope by affirming that a claim for malicious prosecution can be brought not only in respect of criminal proceedings, but also of civil ones. See: *Crawford Adjusters & Ors v Sagicor General Insurance (Cayman) Ltd & Anor (Cayman Islands)* [2013] UKPC 17, [2013] 3 WLR 927.

⁶⁷ Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell 2014), 46-017. Also see: *Spalding v Gamage* (1918) 35 RPC 101, 110 LT 530; *Unik Time Co Ltd v Unik Time Ltd* [1982] FSR 121, 124; *Fenty & Ors v Arcadia Group Brands Ltd & Anor* [2015] EWCA Civ 3, [2015] WLR 3291, [33].

⁶⁸ For the recognition that damages may be awarded in the tort of false imprisonment for injury to reputation, see: McGregor, *McGregor on Damages* (n 67), 40-017; *Walter v Alltools Ltd* (1944) 61 TLR 39, 40: 'a false imprisonment does not merely affect a man's liberty; it also affects his reputation'; *Lunt v Liverpool City Justices* (CA, 5 March 1991). Harm to reputation is only treated as an aggravating feature of the trespass, which impacts the quantum of damages awarded to the claimant. See: *Laine v Chief Constable of Cambridgeshire* (CA, 14 October 1999).

⁶⁹ In *Thurston v Charles* (1905) 21 TLR 659, damages were awarded at large for all the prejudicial consequences of the wrong. These included harm to reputation, which was treated as a type of consequential loss. The primary remedy was an award of nominal damages for the value of the thing converted.

⁷⁰ Descheemaeker, 'Protecting Reputation: Defamation and Negligence' (n 40), 622: 'In terms of primary interests, it is very clear that reputation is not protected by negligence: there exists no duty to take care not to injure the reputation of our neighbours-at-law, be it through true or false words... When it comes to the parasitic protection of reputation by the tort of negligence, the existing case law is extremely scarce; but it does not seem to support a similar blanket exclusion. Thus, in *Mulvaine v Joseph*, the loss of "prestige" flowing from the claimant not having been able to participate in a tournament as a consequence of the defendant negligently injuring him physically was deemed to be recoverable as a type of consequential loss'.

of original work. However, cases have noted that reputation is protected in a right constituting way under the Copyrights, Designs and Patents Act (CPDA) 1988. The right to object to derogatory treatment of a work under section 80 is described as being ‘designed to protect the reputation of others’⁷¹ as authors. Indeed, before this right was introduced by the 1988 Act, authors generally objected to this type of treatment by bringing a claim in the tort of defamation.⁷² In fact, the wording of the Act was chosen because of its close resemblance to existing personal rights in defamation and passing off.⁷³ So, in the wrong of section 80, as is the case in defamation, reputation is protected as a primary interest.

2. *Overlapping heads of criminal liability*

Although the Coroners and Justice Act 2009 abolished the offence of defamatory libel,⁷⁴ there still exist criminal wrongs which afford some degree of protection to reputation.

The Public Order Act 1986 (POA) criminalises abusive words in specific circumstances. Under sections 18-19, it is a criminal offence to use, display or publish threatening, abusive or insulting words intended or likely to stir racial hatred. This type of hate speech often takes the form of a defamatory statement aimed at a group or class of persons. Some jurisdictions (including France) in fact reflect this state of affairs by characterising these offences as ‘group libel’ or ‘collective defamation’.⁷⁵ While this is not the case in England, up until the end of the 19th century the main source of interference with freedom of expression were public order crimes, commonly known as libels. It is these crimes that the Public Order Act has supplemented.⁷⁶ The conceptual overlap between defamation and public order offences is therefore apparent; the latter clearly

⁷¹ *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274, [2003] EMLR 790, [161].

⁷² Nicholas Caddick *et al*, *Copinger & Skone James on Copyright* (16th edn, Sweet & Maxwell 2013), 11-39.

⁷³ Gillian Davis and Kevin Garnett, *Moral Rights* (Sweet & Maxwell 2010), 8-036.

⁷⁴ S. 73 of the Coroners and Justice Act 2009.

⁷⁵ In France, see art. 24 of the law of 29 July 1881, which regulates defamation on the grounds of race, ethnicity, gender, sexual orientation, religious belief, or disability. For a surveys of other European countries, see: Jeremy Waldron, *The Harm in Hate Speech* (HUP 2012), 39ff.

⁷⁶ See: *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296, [2012] 4 All ER 717, [65]-[66].

afford some protection to reputation. However, their purposes are fundamentally different. This is apparent in *R v Sheppard and Whittle*,⁷⁷ in which the judges warned against applying principles of the civil law of defamation directly to the criminal law realm.⁷⁸ The main goal of public order offences being to preserve the public confidence in the stability of society, the statutory wrongs in POA only protect reputation as a collateral interest.^{79,80}

Similarly, the statutory wrong of harassment under the Protection From Harassment Act 1997 (PFHA) sometimes protects reputation as a secondary interest.⁸¹ Under section 1 of the Act, a person must not pursue a course of conduct which amounts to harassment and which he knows or ought to have known amounts to harassment of the other. While harassment is not defined in the Act, Lord Phillips MR described it in *Thomas v News Group Newspapers Ltd*⁸² as ‘conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable.’⁸³ There is a clear overlap with defamation in that such conduct includes speech.⁸⁴ By way of example, in *Trimingham*⁸⁵ the conduct complained of was the repeated publication of statements concerning an affair the claimant had engaged in with a public figure. While the statements were defamatory, they

⁷⁷ *R v Sheppard and Whittle* [2010] EWCA Crim 65, [2010] WLR 2779.

⁷⁸ *Ibid*, [27], [35].

⁷⁹ John E Stannard, ‘Sticks, Stones and Words: Emotional Harm and the English Criminal Law’ (2010) 74 J Crim Law 533, 544. The author develops a similar line of reasoning in the criminal law context (at 545): ‘All of these crimes involve the infliction of emotional harm, but ... the emotional harm is “parasitic” in nature; none of the crimes considered above consists of the infliction of emotional harm *simpliciter*, but rather requires that it be inflicted in particular circumstances and by virtue of particular conduct on the part of the defendant.’

⁸⁰ Insults may also infringe the right to reputation, and up until recently they constituted a criminal under the provisions of the POA. The use of words, gestures or acts carrying an offensive meaning may well constitute an attack on reputation by expressing devaluation or contempt, without being defamatory for the purposes of the law. The general offence regulating insulting behaviour was traditionally found in s. 5 of the POA. However, since ss. 57(1) and 57(2) of the Crime and Courts Act 2013 amended s. 5(1) so as to no longer criminalise insulting words, the focus of this provision has lastingly moved away from the protection of reputation.

⁸¹ Interestingly, harassment – like defamation once was –, is both a civil wrong and a criminal offence (ss. 2 and 3 of the PFHA). On the historical evolution of the nature of defamation liability and the distinction between civil and criminal defamation, see Chapter 2: The framework of defamation liability in comparative historical perspective, IIA.

⁸² *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 78.

⁸³ *Ibid*, [30].

⁸⁴ Protection From Harassment Act 1997, s. 7(4).

⁸⁵ *Trimingham* (n 76).

were also true and therefore not actionable in the tort of defamation. The claim was brought under the PFHA, highlighting how the Act can be used to ground liability for the publication of defamatory statements. However, the PFHA and the law of defamation have different aims. The law of defamation focuses on harm to reputation. The distress that may be caused to the subject of the article is irrelevant (although it may impact the quantum of damages if liability is established). By contrast, the wrong of harassment solely focuses on the distress experienced by the claimant, when it is attended by some exceptional circumstance which justifies the imposition of sanctions.⁸⁶

3. The focus on the tort of defamation

This overview suggests that the protection of reputation in English law is reasonably spread out. However, only two causes of action protect reputation in a right-constituting way: the tort of defamation and the right to object to derogatory treatment of a work under section 80 of the CPDA. The choice to focus exclusively on defamation is based on historical considerations. The law of defamation possesses a long history in English law, and has always been the primary legal means to protect reputation. The right in section 80 has built on the existing framework of protection of reputation, and supplemented it in specific circumstances in relation to authors. Nevertheless, the concept of reputation it relies on is still interpreted in light of the principles developed in the context of the wrong of defamation.⁸⁷ This thesis therefore only examines defamation, as it remains at the roots of the protection of reputation in English law. It is this tort and its constituent elements and defences to which this chapter now turns; remedies as a topic will be addressed later on in Chapter 5.⁸⁸

⁸⁶ *Thomas* (n 82), [35].

⁸⁷ *Caddick et al* (n 72), 11-45.

⁸⁸ Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, IIA1.

B. Overview of the modern law of defamation

In England, the only tortious cause of action that protects reputation as a primary interest is defamation. The current law of defamation is the result of the interplay of complex common law rules and repeated statutory efforts to rationalise them, the latest Defamation Act (2013) having come into force on 1 January 2014.

The general principle is that any defamatory statement communicated to a third party which is likely to substantially harm the claimant's reputation is a legal wrong. The tort of defamation distinguishes two kinds of statement according to the permanence of their form. Libel consists of a defamatory imputation in a permanent form, such as writing;⁸⁹ slander consists of an imputation in a non-permanent form, such as spoken words, sounds or gestures. The main difference between the two is that slander is only actionable *per se* when the imputation falls within one of two specific categories of statements.⁹⁰

1. Establishing a case in the tort of defamation

For an individual claimant to establish his case in the tort of defamation (subject to any available defences) he must prove that the statement is defamatory, has caused or is likely to cause serious harm, refers to him and has been published. Where the claimant is a company, it can maintain an action for any words which have a tendency to damage its trading interests.⁹¹

⁸⁹ It may also include broadcasts (Defamation Act 1952, s. 1) and theatre performances (Defamation Act 1952, s. 16(1) and Theatres Act 1968, s. 4(3)).

⁹⁰ Following the enactment of the Defamation Act 2013, according to its s. 14 the two categories of slander actionable without proof of special damage concern imputations: (1) of a criminal offence punishable by imprisonment or (2) likely to damage the claimant's reputation in relation to any office, profession, calling, trade or business held or carried on by him at the time of publication.

⁹¹ Defamation Act 2013, s. 1(2); *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, 58 JP 196, 145. Note that this rule is applicable to companies rather than to legal entities in general. Following the case of *Derbyshire County Council v Times Newspapers Ltd and Others* [1993] AC 534, [1993] 1 All ER 1011, public bodies are not in any circumstances entitled to bring claims in defamation; the public body's legitimate interest in bringing a claim was given less weight than considerations relating to freedom of expression.

There exist various tests to determine whether a statement carries a defamatory meaning, all of which refer to a societal norm.⁹² Commonly cited is the test in *Sim v Stretch*, which considers whether the statement would tend to lower the claimant in the estimation of the right-thinking members of society generally.⁹³ This reference implies that the defamatory nature of a statement depends on the judgement of the members of society, which will be influenced by changing mores. In order to characterise its defamatory nature, the statement is examined in its ‘natural and ordinary meaning’:⁹⁴ the whole of the publication is taken into account⁹⁵ in order to identify the exact meaning of innuendos or ambiguous words. Further, according to section 1(1) of the Defamation Act 2013, the statement must be shown to have caused or be likely to cause serious harm to the claimant’s reputation. This is a higher standard than those that existed prior to the coming into force of the Act, which respectively referred to a threshold of seriousness⁹⁶ and to the necessity to prove a real and substantial tort.⁹⁷ In *Cooke v MGN Ltd*,⁹⁸ the court found that a statement which would have counted as defamatory prior to the coming into force of the 2013 Act did not qualify as such under the new framework of section 1(1). There was no specific evidence that the article had caused harm to the claimants’ reputations, serious harm could not be inferred, and it was not more likely than not that serious harm would be caused in the future.

The actionability of defamatory matter further depends on the statement’s reference to the claimant. This is judged on an objective basis, regardless of the defendant’s actual or constructive knowledge. Thus, where the statement refers

⁹² The original test was whether the statement complained of was calculated to hold the claimant in ‘hatred, contempt or ridicule’ (*Parmiter v Coupland* (1840) 6 M & W 105, (1840) 151 ER 340). Its inherent limitations led to the widening of the test to include any statement that would tend to lower the claimant in the estimation of the right-thinking members of society generally (*Sim v Stretch* [1936] 52 TLR 669, [1936] 2 All ER 1237), affect him adversely in the estimation of reasonable people generally (*Gillick v BBC* [1996] EMLR 267) or cause him to be shunned or avoided (*Youssouf v MGM Pictures Ltd* (1934) 50 TLR 581).

⁹³ *Sim v Stretch* (n 92), 1242.

⁹⁴ *Gillick v BBC* (n 92), 268.

⁹⁵ *Broome v Agar* (1928) 138 LT 698, 44 TLR 339, 341.

⁹⁶ *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, [2011] 1 WLR 1985.

⁹⁷ *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

⁹⁸ *Cooke v MGN Ltd* [2014] EWHC 2831, [2015] 1 WLR 895.

to a group, body or class of persons, an individual member of the said group will be able to bring a claim where the words are understood to refer to him.⁹⁹

Finally, defamation claims can only proceed where the claimant proves that the statement has been published. Understood in a legal rather than a literal sense, publication involves any communication of the statement to a third party other than the claimant himself.¹⁰⁰ The publication must be either intentional or negligent and be the natural and probable consequence of the defendant's actions.¹⁰¹

2. Defences

Where the above-mentioned requirements are proven, the claimant has established a case, subject to available defences. The Defamation Act 2013, building on the common law, considerably modified the landscape of defences to an action for defamation.

First, the Act put pre-existing defences on a statutory basis in sections 2 to 4. The truth defence in section 2 allows the claimant to escape liability, either fully or in part,¹⁰² where he can prove the substantial truth of the statement.¹⁰³ In section 3, the defence of honest opinion protects statements of opinion which indicate the basis of the opinion and could have been held by any reasonable person on the basis of any existing facts or privileged statements published at the time the opinion was issued.¹⁰⁴ Finally, section 4 protects 'publications on a matter of public interest' where the defendant reasonably believed that there was a real public interest in the subject-matter of the published statement.¹⁰⁵

⁹⁹ *Knupffer v London Express Newspaper Ltd* [1944] AC 116, [1944] 1 All ER 495. Also see: *Le Fanu v Malcolmson* (1848) 1 HLC 637.

¹⁰⁰ *Parkes et al* (n 60), 6.12.

¹⁰¹ *Godfrey v Demon Internet* [2001] QB 201, [1999] 4 All ER 342.

¹⁰² Defamation Act 2013 ss. 2(1) and (3).

¹⁰³ *Parkes et al* (n 60), 11.6-11.9.

¹⁰⁴ *Ibid*, 12.4. In the absence of any facts grounding the comment/opinion, the defendant must plead truth to escape liability: *Lowe v Associated Newspapers Ltd* [2006] EWHC 320, [2006] 3 All ER 357, [55]; *Joseph v Spiller* [2010] UKSC 53, [2011] 1 All ER 947, [5].

¹⁰⁵ *Parkes et al* (n 60), 15.4. For a critique of s. 4, see: Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIIA3.

The Act also expanded the scope of the categories of privilege in sections 6 and 7. As a rule, privilege can be given at common law or by statute to certain statements. This privilege can be absolute (for statements which are judicial, parliamentary or official),¹⁰⁶ or qualified (for a variety of statements including reports of legislatures, courts, governmental inquiries, public meetings, general meetings of listed companies, peer-reviewed statements; this form of privilege can be defeated on proof of malice).¹⁰⁷

Finally, the Defamation Act 2013 created a new defence benefiting operators of websites. Since the 1996 Act came into force, a person who is not the author, editor or (commercial) publisher of the defamatory statement can escape liability.¹⁰⁸ By virtue of section 5 of the newest Act, the legislator broadened the category of persons escaping liability due to their lack of involvement in the process of publication. A defendant website operator will not be liable for statements published on his website by an identifiable third party, unless he acted maliciously.

IV. The protection of reputation in French law

A. Wrongs protecting reputation

Defamation, which is one of the so-called French ‘press wrongs’,¹⁰⁹ is expressly regulated by the law of 29 July 1881 on freedom of the press. At its inception, the law of 29 July 1881 served an instrumental purpose in that it collected previously scattered legislative provisions regulating the abuses of the right to freedom of expression. Barbier notes that its codification-like aim was to bring together in a single law all the wrongs that could be committed by way of the

¹⁰⁶ Ibid, Chapter 13.

¹⁰⁷ Defamation Act 1996 s. 15 as amended by s. 7 of the Defamation Act 2013. See generally Parkes *et al* (n 60), Chapters 14 and 16 (specifically 16.1).

¹⁰⁸ Defamation Act 1996 s. 1(1).

¹⁰⁹ On the use of the ‘press’ label, see Chapter 2: The framework of defamation liability in comparative historical perspective, specifically IVB.

press.¹¹⁰ However, this goal was soon defeated; as early as 1894 a variety of laws which implemented restraints outside of the scope of the law of 29 July 1881 were adopted. Doctrinal writers note the consequent difficulty in establishing an exhaustive list of all the restrictions to the right to freedom of expression in French law.¹¹¹ Nevertheless, a variety of studies do consider the scope of freedom of expression by studying its limits, which they classify by reference to the interests they protect. Among such interests, the public order and the rights to privacy and reputation are commonly cited.¹¹²

The protection of the right to reputation is illustrative of the proliferation of independent causes of action outside of the scope of the 1881 law. As is the case in English law, the interest in reputation is protected by different causes of action, but not always as a primary interest.

According to doctrinal writers considering the scope of freedom of expression, the right to reputation is protected by the *délits* (a species of criminal offence)¹¹³ of article 29 of the 1881 law: defamation and *injures* (injurious words). The wrong of defamation consists in any allegation or imputation of a precise¹¹⁴ fact which harms the victim's *honneur* (honour) and *considération* (esteem).¹¹⁵ The wrong of *injures*¹¹⁶ covers any outrageous or contemptuous words that do not impute a fact or do not have a sufficient degree of precision.¹¹⁷ Thus, a statement imputing a fact capable of being characterised as a criminal wrong is sufficiently precise to fall within the scope of defamation.¹¹⁸ By contrast, a statement alleging that the claimant has committed, against persons unknown, acts

¹¹⁰ Georges Barbier, *Code Expliqué de la Presse*, vol 1 (2nd edn, Marchal et G Godde 1911), 1.

¹¹¹ See, for instance: Patrick Wachsmann, *JCl. Libertés*, Fasc. n°800, 2008, 50.

¹¹² Patrick Wachsmann, *Libertés Publiques* (6th edn, Dalloz Cours 2009), 474-75; Roseline Letteron, *Libertés Publiques* (9th edn, Précis Dalloz 2012), 568, 576.

¹¹³ On the French classification of criminal wrongs, see below Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIB.

¹¹⁴ Cass crim, 6 March 1974, Bull crim 1974, n°96; Cass civ (1), 11 March 2014, Bull civ 2014, I, n°34.

¹¹⁵ Art. 29, *alinéa* 1.

¹¹⁶ Art. 29, *alinéa* 2.

¹¹⁷ Cass crim, 22 March 1966, Bull crim 1966, n°108; Cass civ (2), 3 June 2004, Bull civ 2004, II, n°271.

¹¹⁸ Cass civ (2), 14 March 2002, Bull civ 2002, II, n°46 (where the disputed statement described sects, and more specifically Jehovah's Witnesses, as criminal associations – a formal head of liability in the French Criminal code).

comparable to those that are usually undertaken by petty offenders, with no specific indication of location or time, was considered by the *Cour de cassation* to fall within the scope of *injures* due to its imprecise character.¹¹⁹ Despite this formal distinction, the wrongs of defamation and *injures* share constituent elements such as the reference to the claimant, the defendant's intention and the need for the statement to be published. The dividing line between both is sometimes tenuous, and there is some measure of overlap between the two causes of action, insofar as the definition of *injures* is only residual to that of *diffamation*: as long as the remaining constituting elements of the wrong are characterised, anything that is not sufficiently precise to be defamatory falls within the scope of *injures*.

Doctrinal studies do not usually mention any other wrongs, thereby suggesting that defamation and *injures* are the only wrongs which limit freedom of expression by protecting the right to reputation in French law. This reveals a gap in the authors' analyses. In practice, reputation is protected by a variety of other causes of action, which stretch across tortious and criminal liability.

1. Overlapping heads of civil liability

While the French courts have expressly rejected the freestanding imposition of civil liability in respect of the wrongs of article 29,¹²⁰ there exist other civil causes of action which protect reputation. The most obvious cases of overlap arise in the wrong of *dénigrement* (disparagement). However, other causes of action – including the law of authors' rights – also offer (more limited) protection to the interest in reputation and will be examined in a second sub-section.

¹¹⁹ Cass crim, 6 March 1974, Bull crim 1974, n°96.

¹²⁰ See Chapter 2: The framework of defamation liability in comparative historical perspective, IIB4. 'Freestanding' is meant to qualify this statement to the extent that claimants can bring an *action civile* (a compensatory type of claim considered below in section VB).

a) *Dénigrement*

The tortious wrong of *dénigrement*, regulated by article 1382 of the Civil code, covers similar ground to that of malicious falsehood in English law. It is an act of unfair competition which consists in discrediting a competitor's products or services.¹²¹

The distinction with the wrong of defamation may be difficult to establish. Indeed, the same statement may ground liability under both causes of action. The type of criticism grounding liability in *dénigrement* may be (and in fact often is) defamatory. Further, even if the object of the criticism is a person rather than a product or a service, the statement will not automatically fall within the scope of the law on the press. In such a situation, one must ascertain the goal of the critique in order to determine the appropriate cause of action. It is only in cases in which the defendant does not merely intend to harm his competitor's reputation but rather does so as a way to (and with the ultimate objective of) diverting his competitor's clientele, that the wrong will fall outside the scope of the law on the press.¹²² By way of example, *dénigrement* is characterised where a company criticises a competing company's manager with the goal of contesting the claimant company's quality of services and thereby to divert its clientele.

Therefore, while the concern for the victim's reputation is at the core of both the wrong of *dénigrement* and that of defamation or *injures*, it is the ultimate goal of the critique which distinguishes the former from the latter. Mirroring the approach adopted in the tort of malicious falsehood, *dénigrement* only protects an individual's interest in their reputation as a secondary interest.

¹²¹ Cass crim, 8 February 1994, Bull crim 1994, n°58.

¹²² Cass civ (1), 5 December 2006, Bull civ 2006, I, n°532; D 2008, 672. This is subject to the principle of divisibility of the claims; where the claims are not divisible, the claimant must sue in the wrong of defamation: Cass civ (2), 29 November 2001, Bull civ 2001, II, n°176.

b) The moral right in article L121-1 of the Intellectual Property code

As is the case in England, reputation is protected by some wrongs connected with authors' rights. The French Intellectual Property (IP) code protects the author's right to respect for his name, his authorship and his work.¹²³ The provisions of the code allow an author to bring a claim in respect of actions which threaten the integrity of their work. It is widely accepted that reputation is one of the interests protected by article L121-1.¹²⁴ However, it is not protected as a primary interest. It is only protected insofar as it is expressed in a work protected by the provisions of the code; article L121-1 cannot be used as a basis to provide freestanding protection to one's private interest in reputation.¹²⁵ Indeed, where the interference with an author's right to reputation is not directly linked to the author's work, the interference is only actionable under the traditional causes of action protecting reputation (including defamation).¹²⁶

c) Other civil heads of liability protecting reputation

It has sometimes been argued that other heads of civil liability also protect reputational interests. Building on pre-existing doctrinal works, Beignier thus argues that some instances of privilege are designed to protect reputation. He illustrates his view by referring to the patient-physician privilege, for which he suggests that what is being concealed is not the patient's condition but rather its potentially suspicious origins.¹²⁷ He develops a similar line of reasoning in relation to the wrong of blackmail. Beyond the wrongful extortion of money, Beignier sees blackmail as a type of moral violence that instils fear for one's

¹²³ Art. L121-1 of the IP Code. See, generally: André Lucas *et al*, *Traité de la Propriété Littéraire et Artistique* (4th edn, LexisNexis 2012), 494ff.

¹²⁴ Lucas *et al* (n 123), 546. In the case law, see for instance: CA Paris, 9 May 1989, D 1990, 60 and Cass civ (1), 7 November 2006, *Pierre Perret*, JCP G 2007, II, 10000; Christophe Caron, 'La Compil' 2006 du Droit Moral: Cass. 1re civ., 7 nov. 2006' (2006) 2006(12) CCE comm. 152: '*n'est de nature à porter atteinte au droit moral de l'auteur ... qu'autant qu'elle risque d'altérer l'œuvre ou de déconsidérer son auteur*' (emphasis added). The provisions of the code are more protective than those of s. 80 CPDA, and their protection is not limited to the author's reputation. See: Lucas *et al* (n 123), 545; Jacques de Werra, 'The Moral Right of Integrity' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), 269.

¹²⁵ Cass civ (1), 10 March 1993, n°91-15915.

¹²⁶ Pierre Sirinelli, 'Le droit moral de l'auteur et le droit commun des contrats' (Paris II Panthéon-Assas 1985), 362.

¹²⁷ Bernard Beignier, *L'Honneur et le Droit* (LGDJ 1995), 119-20.

reputation.¹²⁸ However, actionability does not depend on the harm to reputation, but rather on the wrongful disclosure or extortion of money. Thus, reputation is only protected as a secondary interest.

2. *Overlapping heads of criminal liability*

As is the case in England, there also exist various criminal causes of action which protect reputation. Interestingly, in France all of these overlapping heads of liability protect reputation in what can be labelled a ‘wrong-constituting way’. This terminology is intended to evoke that of ‘right-constituting’ used above¹²⁹ whilst reflecting the fact that these wrongs do not correlate with individual rights.

The most obvious overlap is found in situations in which liability arises on the basis non-public defamation and *injures*. These wrongs mirror those of article 29, but ground liability on the basis of the ordinary provisions of the Criminal code for statements which fall short of the publicity requirement of the law of 1881. Reputation is also protected by two other criminal wrongs, *outrage* (contempt) and *dénonciation calomnieuse* (false denunciation), whose scope closely mirrors that of article 29 defamation. Distinguishing these wrongs from those of article 29 has practical consequences: falling outside the scope of the law on the press, they do not benefit from its defendant-friendly procedural guarantees.¹³⁰

a) Non-public defamation and *injures*

Under the law of 29 July 1881, the concept of publication is not understood in a literal sense. Rather, article 23 lists the ‘means’ by which publication is characterised for the purposes of the law on the press. The spectrum is broad: it includes speech, cries and threats uttered in public places as well any other

¹²⁸ Ibid, 131-32.

¹²⁹ Above IIA.

¹³⁰ The most commonly cited is art. 65 of the law of 29 July 1881, which establishes a three-month prescription period after which statements are no longer actionable.

medium of communication covering writings, images and speech that are sold, distributed or displayed in public places, or transmitted online.¹³¹

Where defamation and *injures* are considered not to have been published for the purposes of article 23, they fall within a different category of criminal wrongs, to reflect the lesser degree of the offence. The Criminal code mirrors the wrongs of defamation and *injures* recognised in the law of 29 July 1881.¹³² Lacking the aggravating circumstance of publicity,¹³³ they are characterised as minor criminal wrongs (*contraventions* rather than *délits*) and the applicable sanctions are less severe. For a ‘simple’ wrong against a private person, the quantum of the fine is thus drastically reduced from a maximum of €12,000 to a mere €38.¹³⁴ Yet, insofar as the statement is still communicated to a third party, their primary aim is one and the same with the wrongs of defamation and *injures* which do meet the publicity requirement. It is to protect the victim’s reputation, which is treated as a primary interest.¹³⁵

b) *Outrage* (contempt)

This goal is also shared by the wrong of *outrage*. In its ordinary meaning, the word *outrage* is understood as an extremely serious offence harming a person’s honour or dignity. It is a form of affront or insult¹³⁶ that is addressed directly to the victim, whereas defamation and *injures* are usually addressed to an indeterminate audience.¹³⁷ Its close relationship with the wrongs of article 29 is reflected in its historical treatment. Before the first laws on the press were enacted in 1819, *outrage* was technically treated as a sub-category of *injures*. Gradually, the scope of the wrong was reduced to the restricted position that it

¹³¹ Art. 23, *alinéa* 1.

¹³² Art. R621-1, R621-2, R624-3 and R624-4 of the Criminal code.

¹³³ On the interpretation of the publicity requirement as a species of aggravating circumstance, see: Emmanuel Dreyer, *Responsabilités Civile et Pénale des Médias: Presse, Télévision, Internet* (3rd edn, LexisNexis, Litec 2011), 422.

¹³⁴ Art. 131-13 of the Criminal code lists the quantum of the fines for the category of criminal wrongs that cover arts. R621-1, R621-2, R624-3 and R624-4.

¹³⁵ Emmanuel Dreyer, *JCl. Pénal Code*, Fasc. n°20, 11-14.

¹³⁶ Larousse, *Dictionnaire de la langue française* (online), ‘Outrage’: ‘Offense extrêmement grave, constituant une atteinte à l’honneur, à la dignité ; affront, injure’.

¹³⁷ Cass crim, 10 August 1881, Bull crim 1883, n°207.

possesses in the present day.¹³⁸ Only three forms of *outrage* subsist, all of which are criminal wrongs: one is found in the law on the press and the other two in the Criminal code.¹³⁹ To this day, their degree of similarity with the wrongs of defamation and *injures* is such that it has been suggested that the essence of the wrong can only be grasped by way of comparative analysis with the wrongs of article 29.¹⁴⁰

Thus, defamation and *outrage* are analogous causes of action. *Outrage* is perhaps best understood as a specific instance of defamation. As is the case in English law for slander affecting official, professional or business reputation, the status of the claimant has led to the devising of a distinct set of rules.¹⁴¹ And so, reflecting its historical treatment as a sub-category of article 29 *injures*, the wrong of *outrage* shares the general goal of protecting the victim's reputation as a primary interest.

c) *Dénonciation calomnieuse*

More puzzling than all other wrongs protecting reputation is that of *dénonciation calomnieuse*. It consists in the false imputation of a criminal offence and falls within the scope of the Criminal code rather than within that of the law on the press.¹⁴² In that sense it mirrors the English wrong of malicious prosecution. But in practice, contrary to its English counterpart, it is difficult to justify the separate existence of the wrongs of defamation and of *dénonciation calomnieuse*.

Often, the facts grounding liability for a *dénonciation calomnieuse* can also ground liability for defamation. Due to the very nature of the wrong of *dénonciation calomnieuse*, defamation law's strict requirement that a sufficiently precise fact be imputed is always met.

¹³⁸ Patrick Auvret, *JCl. Communication*, Fasc. n°3140, 5.

¹³⁹ Art. 37 of the law of 29 July 1881, arts. 433-5 and 434-24 of the Criminal code.

¹⁴⁰ Edouard Verny, 'L'Outrage' in Danielle Corrigan-Carsin (ed), *La Liberté de Critique* (LexisNexis Colloques et débats 2007), 198.

¹⁴¹ See s. 2 of the Defamation Act 1952.

¹⁴² Art. 226-10, *alinéa* 1 of the Criminal code.

The main formal distinction with the wrong of defamation appears to be the existence of a requirement of falsity for the wrong of article 226-10 of the Criminal code, when there is no corresponding requirement in the law of defamation.¹⁴³ Nevertheless, the distinction between *dénonciation calomnieuse* and defamation is questionable in light of the policy objectives underlining the former type of wrong. Parliamentary debates preceding the adoption of the law of 8 October 1943 which modified the wrong of *dénonciation calomnieuse* noted that the interest it protects is of private character.¹⁴⁴ Indeed, actionability is not based on the fact that an offence may have been committed against the administration of justice and that the claimant may be put in jeopardy of criminal proceedings. Rather, as is the case for defamation, it is based on the damage caused to the claimant's reputation, which is protected as a primary interest.

So the only distinction with the wrong of defamation is the object of the disputed statement: where the statement imputes a criminal offence, it falls outside the scope of the law of 29 July 1881. In practice, *dénonciation calomnieuse* is better analysed as a specific instance of the wrong of defamation than as a distinct wrong. This is, in fact, the position in the English law of defamation, where liability for the imputation of a criminal offence arises under the wrong of defamation.¹⁴⁵

3. The focus on the wrong of article 29

It is now clear that, as is the case in England, in France various heads of liability protect reputation. The wrong of defamation in article 29 is only one of the causes of action which protect defamation in a right- or wrong-constituting way, alongside non-public defamation and *injures*, *outrage* and *dénonciation calomnieuse*. The reason for choosing to confine the scope of this thesis to the more limited wrong of article 29 relates to its foundational importance in the

¹⁴³ But I argue that changes in the treatment of the *exceptio veritatis* have led to the establishment of a presumption of falsity. See Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IIIB1.

¹⁴⁴ Dominique Commaret, *JCl. Pénal Code*, Fasc. n°20, 105.

¹⁴⁵ Whether as an instance of libel or slander, for which there exist special rules allowing for the statement to be actionable *per se*. See above, n 90.

protection of reputation. The wrong of defamation in article 29 remains the core provision protecting reputation in French law. The other causes of action which protect it as a primary interest are alternatively analysed as specific instances of defamation (this is the case for the wrongs of *outrage* and *dénonciation calomnieuse*, as was noted above) or as wrongs of secondary importance (as is the case for the article 29 wrong of *injures*, since it is only characterised where the statement complained of falls short of the precision requirement of the wrong of defamation, or for the wrongs of non-public defamation and *injures* which are only characterised where the statement falls short of the publicity requirement of article 23).

This thesis therefore only considers article 29 defamation, as it remains the core provision protecting reputation in French law. The next section will give an overview of the regulation of defamation under the 1881 law on the press; the remedial aspects of defamation will be considered in more detail in Chapter 5.¹⁴⁶

B. Overview of the modern law of defamation

1. Establishing a case under article 29

To a large extent, the requirements to establish a case under article 29 mirror those in the English wrong of defamation: the statement must be defamatory, refer to the claimant and have been published. A further distinctive requirement is found in the French wrong: namely, intention.

According to article 29, a statement is defamatory where it consists in a negative comment that relates to a precise and determined fact, which harms the claimant's *honneur* and *considération*.¹⁴⁷ The debate about whether the reproach should consist in an *imputation* (imputation) or *allégation* (allegation) rests on a

¹⁴⁶ Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, IIA2.

¹⁴⁷ The distinction between *honneur* and *considération* is difficult to establish: see Dreyer, *Responsabilités Civile et Pénale des Médias* (n 133), 172ff. Courts do not usually distinguish them.

subtle distinction of doubtful utility.¹⁴⁸ The crux of the enquiry is whether the statement is sufficiently precise to be the object of proof and contradictory debate. In order for a statement to be characterised as defamatory, it is also necessary to prove harm to the claimant's honour or esteem. The case law considers whether the statement has harmful consequences objectively and contextually.¹⁴⁹ As a result of this examination *in abstracto*,¹⁵⁰ as is the case in England, it is sufficient to prove that the statement is likely to cause harm.¹⁵¹

The defamatory statement must refer to a person (be it a private person or a corporate body) or to a group; they need not be named as long as they are designated and identifiable. Where the statement concerns a group, which does not have legal personality and consequently no standing to sue, the *Cour de cassation* has adopted a reasoning similar to that of the (then) House of Lords. Individual claims are allowed where the statement concerning a group is not so generalised that the individual claimant cannot show that he was a clear target, personally affected.¹⁵²

The statement must have been published for the purposes of article 23, which lists various means which satisfy the publication requirement in the law on the press.¹⁵³

Finally, and in contrast to English law, in French law liability for the wrong of defamation requires proof of the defendant's intention, which is presumed.¹⁵⁴ This requirement of intention has two facets: the will or conscience that the

¹⁴⁸ Dreyer, *Responsabilités Civile et Pénale des Médias* (n 133), 156-60.

¹⁴⁹ Cass crim, 21 February 1984, Bull crim n°65; Cass crim, 18 October 1994, Dr pén 1995, comm. n°35.

¹⁵⁰ Cass crim, 15 November 1990, Bull crim n°333; Cass crim, 2 July 1975, Bull crim n°174, Gaz Pal 1975.2.666.

¹⁵¹ Beignier (n 127), 160; Auvret (n 138), 13.

¹⁵² Jean Pradel and Michel Danti-Juan, *Droit Pénal Spécial* (3rd edn, Cujas 2004).

¹⁵³ See above, IIIA1.

¹⁵⁴ Cass crim, 26 February 1875, D 1877. I discuss this element of intention in Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIA, IIB.

statement may adversely affect the claimant's *honneur* and *considération*, and the intent to publish the statement.¹⁵⁵

2. *Specific forms of defamation*

There exist additional, specific forms of the wrong of defamation. Only one of them, defamation *contre la mémoire des morts* (against the memory of the dead),¹⁵⁶ follows the exact same rules as those in article 29. For other forms of defamation, the applicable rules are slightly different, either more relaxed or more stringent. Thus, defamation of the deceased's heirs does not require the claimant to prove that the statement relates to a precise and determined fact.¹⁵⁷ On the contrary, rules are stricter in the context of aggravated forms of the wrong of defamation, which correspond to the POA offences in England. Where defamation is discriminatory¹⁵⁸ or directed at either a public institution¹⁵⁹ or a public official,¹⁶⁰ the substantive elements to be proven in order to bring a claim are defined to a higher degree of precision.¹⁶¹

3. *Defences*

Where the claimant has proven the relevant constituent elements, he has established a case under article 29 subject to proof that the statement was privileged,¹⁶² or to any defences. The categories of privileged statements correspond to those covered by absolute privilege in England (judicial and parliamentary statements) and of their reports. Absent any privilege the onus is on the defendant who can escape liability by proving that he was allowed to publish the statement by establishing its truth (*exceptio veritatis*) or that he made

¹⁵⁵ Michèle-Laure Rassat, *Droit Pénal Spécial* (6th edn, Dalloz 2011), 577.

¹⁵⁶ Art. 34, *alinéa* 1.

¹⁵⁷ Cass crim, 9 January 1948, Bull crim 1948, n°9.

¹⁵⁸ E.g. racist, xenophobic and religious defamation (art. 32 *alinéa* 2).

¹⁵⁹ Art. 30.

¹⁶⁰ Art. 31, *alinéa* 1.

¹⁶¹ In the context of defamation of a public institution, the defamatory statement must concern the institution itself (rather than one of its members). Regarding defamation of a public official, the defamatory character of the statement must relate to the person's occupation; this implies the need to identify the given profession.

¹⁶² Art. 41.

it in good faith (*bonne foi*).

While the truth defence was originally limited in scope,¹⁶³ article 35 of the law on the press now allows it in respect of all defendants, including private persons. There exists only one exception to the rule that truth can always be proven: according to article 35, *alinéa* 3, a), the *exceptio veritatis* is not permitted where the statement relates to the claimant's private life. This defence is subject to such strict procedural rules that some authors have suggested that they render the defence illusory.¹⁶⁴

The second defence, which is most commonly relied on, is that of *bonne foi* (good faith). It consists in an indirect rebuttal of the presumption of culpable intent.¹⁶⁵ Relying on a doctrinal piece,¹⁶⁶ the *Cour de cassation* has identified four elements characterising the defendant's good faith: the legitimate duty or interest in making or receiving the statement; the lack of personal animosity; the expression's caution and moderation; the reliability of the investigation.¹⁶⁷

Finally, the defence of provocation may in some instances become relevant. The law on the press only envisages this defence in the context of *injures*. However, because of the difficulty in distinguishing the wrongs of *injures* and *diffamation* and the overlap that exists between both, the reasoning applicable to one is sometimes extended to the other.¹⁶⁸

V. Sketching a distinction between tort and crime

While the wrong of defamation is regulated as a tort in England, French law regulates it as a criminal offence. Both the common law and the civilian

¹⁶³ Bernard Beignier *et al*, *Traité de Droit de la Presse et des Médias* (Litec 2009), 785.

¹⁶⁴ Georges Levasseur, 'Réflexions sur l'*Exceptio Veritatis*' in *Mélanges Offerts à Albert Chavanne: Droit Pénal et Propriété Industrielle* (Litec 1990), 123. The procedural rules are described in Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IIB3.

¹⁶⁵ On the indirect character of such rebuttal, see Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIIB1.

¹⁶⁶ Beignier *et al* (n 163), 793.

¹⁶⁷ Cass civ (2), 27 March 2003, Bull civ 2003, II, n°84.

¹⁶⁸ Beignier (n 127), 179-80.

traditions recognise fundamental differences between civil and criminal proceedings. The impact of such a classification will be addressed throughout the thesis;¹⁶⁹ it is however necessary in a preliminary stage to give a brief account of the distinction between tort and crime by identifying distinctive marks of tortious and criminal wrongs.

A. Private wrongs and public wrongs

A common assertion¹⁷⁰ in the distinction between tort and crime is based on the purpose of each area of law, and can be summarised as follows. Tort is a private law subject, which establishes a framework within which the wronged claimant can seek redress (often embodied in the award of compensatory damages). It holds the wrongdoer to account by generating civil liability through the characterisation of torts or delicts. By contrast, crime is a public law subject where the state, representing the interests of the community, punishes the defendant for the wrong he committed. It generates criminal liability. So, torts are private wrongs and crimes are public wrongs, insofar as they are the proper concern of the public.¹⁷¹

While correct, this distinction is superficial and presents an over-simplified account of the relationship between tort and crime; it must therefore be refined. A meaningful distinction between tort and crime can and should engage with different levels of comparison: procedural, substantive, practical, remedial, normative. This analysis identifies various grounds of distinction, all of which are in fact found to present contact points.

¹⁶⁹ Specifically, I will argue that there generally exists a link between the nature of the regulation – tortious or criminal – and the substantive content of the rules. However, I will challenge the strength of this link in the defamation context. See: Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, II, III; Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, III; Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, II, III.

¹⁷⁰ Perhaps the best known is found in Sir William Blackstone, *Commentaries on the Laws of England* (Project Gutenberg 2009), 54ff; see also Stevens, *Torts and Rights* (n 36), considered at length below in section VF.

¹⁷¹ Antony Duff, *Punishment, Communication and Community* (OUP 2001), 60-64. The author rejects the analysis of crimes as wrongs *done to the public*.

B. Procedure

On a procedural level, a major distinction rests on the notion of control of the process. It is invariably accepted that the tort process is controlled by the claimant, and the criminal one is controlled by the polity.¹⁷² In practice, however, there exists a class of wrongs that are pursued as criminal, but only with the victim's consent or at her request,¹⁷³ as is the case for defamation in French law.¹⁷⁴ What is more, compensation can be awarded in a criminal court and limitation periods are not infrequently aligned.¹⁷⁵ Finally, there exists in French law a bridge between the civil and the criminal process: the *action civile* procedure allows the victim of a criminal wrong to obtain civil damages during the course of a criminal process, as if he were bringing a claim before a civil court.¹⁷⁶ The victim can either join his civil action to a prosecution that has already been filed, or file a civil action although no prosecution has been instigated, thereby forcing the start of criminal proceedings despite the prosecutor's inaction or decision to close the case.¹⁷⁷ It is in essence a civil claim for compensation, judged on the basis of civil law rules, but brought before a criminal judge. However, the *partie civile* (civil party) benefits from some favourable criminal law rules. For instance, the criminal principle of 'freedom of proof' is wider than its civil counterpart, allowing the victim to bring more types of evidence to the court. Moreover, in a criminal trial the burden of proof is on the prosecution; the victim can subsequently substantiate his claim for damages by relying on the elements used by the prosecution to prove the crime.¹⁷⁸

¹⁷² Antony Duff, 'Torts, Crimes and Vindication: Whose Wrong Is It?' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014), 162.

¹⁷³ *Ibid.*, 171.

¹⁷⁴ Art. 48, 6° of the law of 29 July 1881 requires that the victim make a preliminary complaint before the polity can launch the criminal proceedings. The significance of art. 48, 6° is discussed in Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, IIIB.

¹⁷⁵ Matthew Dyson, 'Tort and Crime' in Mauro Bussani and Antony Sebok (eds), *Comparative Tort Law: Global Perspectives - Research Handbooks in Comparative Law Series* (Edward Elgar 2015).

¹⁷⁶ Louis Boré, *JCl. Procédure Pénale*, Fasc. n°20, 9.

¹⁷⁷ In the defamation context: Dreyer, *Responsabilités Civile et Pénale des Médias* (n 133), 762.

¹⁷⁸ Boré (n 176), 35.

C. The relevance of culpability

On a substantive level, Cane notes that mental states are of greater importance in criminal law than they are in tort law. It is a standard requirement in the criminal law that some form of fault – typically intention – be proven. By contrast, tortious liability generally turns on the defendant's negligence. His mental state (specifically, his intention) plays a much less important role in tort law than it does in criminal law.¹⁷⁹ In cases in which intention justifies the imposition of tortious liability where none would arise in its absence (for instance when inflicting harm by competitive market activity), Cane notes that the relevant state of mind is often very difficult to prove.¹⁸⁰ Further, he argues that in cases in which intention justifies that a tortious cause of action arise where none would exist in its absence (for instance in the tort of deceit) are of little practical importance outside of industrial disputes.¹⁸¹ Cane rationalises this finding on the basis of the fact that intention and recklessness focus on the defendant's conduct and mental state, at the expense of the interests of those affected by such conduct. This focus is, in fact, a distinguishing trait of the criminal law that is due to the greater stigma attaching to criminal than to tortious liability.¹⁸²

D. Insurability

On a practical level, there exists a considerable discrepancy in the role played by insurers in tort and criminal law. Their role is practically non-existent in relation to criminal law insofar as criminal wrongs are not risks that can be insured. On the other hand, it is of considerable importance in relation to tort law, whether as part of a private or a state insurance system. Insurers are often the main drive for civil litigation, since they provide the victims with the financial means to bring a claim. Further, they are often the main – if not the only – source of

¹⁷⁹ Peter Cane, '*Mens Rea in Tort Law*' (2000) 20 OJLS 533.

¹⁸⁰ Ibid, 546, 552.

¹⁸¹ Ibid, 547, 552.

¹⁸² Ibid, 553.

compensation, which displaces the responsibility to bear the loss from the defendant onto his insurer.¹⁸³

E. Responses to the wrongs

Finally, the responses to the civil and criminal wrongs differ. Civil remedies are primarily compensatory, and criminal sanctions are primarily punitive.¹⁸⁴ Their focus differs: in tort, the focus is on the claimant and his loss; in criminal law, it is on the defendant and his wrong.

Civil wrongs give rise to remedies, which usually consist in an award of damages. These remedies serve a variety of goals. The first – and the main one – is the payment of monetary damages to the claimant by the wrongdoer.¹⁸⁵ The claimant receives damages, and the defendant pays damages, as compensation or sometimes in excess of compensation. The second is the spreading of loss by shifting it from the innocent party onto the blameworthy, or the one who is in a better position to bear the cost of harm.¹⁸⁶ The third is deterrence:¹⁸⁷ it is thought that the fear of future liability will prevent the commission of similar wrongs, whether by the individual wrongdoer or the general public. The fourth is the reinforcement of social norms through public condemnation of those who violate them.¹⁸⁸

There exist various normative theories that justify the existence of such goals. One such theory, which is appealing in that it appropriately describes the

¹⁸³ Richard Lewis, 'Insurance and the Tort System' (2005) 25 LS 85, 86; Stevens, *Torts and Rights* (n 36), 323.

¹⁸⁴ See, in England: Matthew Dyson (ed) *Comparing Tort and Crime* (CUP 2015); in France: Boris Starck, *Essai d'une Théorie Générale de la Responsabilité Civile Considérée en sa Double Fonction de Garantie et de Peine Privée* (L Rodstein 1947); Marcel Crémieux, 'Réflexions sur la Peine Privée Moderne' in *Études Offertes à Pierre Kayser*, vol 1 (PUAM 1979), 260 (including all the citations); Loïc Cadiet, 'Sur les Faits et Méfaits de l'Idéologie de la Réparation' in *Mélanges Offerts à Pierre Drat: le Juge Entre Deux Millénaires* (Daloz 2000).

¹⁸⁵ Stevens, *Torts and Rights* (n 36), 320.

¹⁸⁶ Ken Oliphant (ed) *The Law of Tort* (Butterworths 2006), 26-27.

¹⁸⁷ Stevens, *Torts and Rights* (n 36), 321.

¹⁸⁸ Allan Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis' in Charles E F Rickett (ed), *Justifying Private Law Remedies* (Hart Pub 2008).

principal features of tortious claims, is that of corrective justice.¹⁸⁹ Accepting that tort law creates norms of conduct, their breach is considered to give rise to a duty of repair in order to restore the injured claimant to the position he was in prior to the commission of the wrong. This theory explains key features of the law of tort, including the payment of damages, and puts the compensatory goal at the heart of tort law.¹⁹⁰

By contrast, criminal wrongs are sanctioned by criminal penalties, the paradigmatic ones being a prison sentence and the payment of a fine. The analysis of criminal penalties highlights a variety of goals pursued by the criminal law. The first – and the main one, which is also the main distinction with tortious claims – is the punishment of the wrongdoer: the state inflicts stigma and suffering upon the defendant, which may include his incapacitation. Another goal is shared with tort law: it is to reinforce social norms and to deter from future wrongdoing through threat of future liability.¹⁹¹ Finally, it is sometimes suggested that criminal law also aims at protecting people from criminal offending.¹⁹²

These goals are justified by reference to normative theories of criminal law. The retributive justice theory warrants punishment of the offender on the basis that he did something that is morally or (of more interest in the law of defamation) socially wrong, in that it creates a risk of breach of the public peace. Punishment proportionate to the harm done is considered to be intrinsically good, and legitimises the infliction of suffering.¹⁹³ In parallel to this account of punishment,

¹⁸⁹ Ernest J Weinrib, *The Idea of Private Law* (HUP 1995), Chapter 3; Ernest J Weinrib, *Corrective Justice* (OUP 2012).

¹⁹⁰ Stevens rightly considers that corrective justice is ‘inevitably incomplete’ (Stevens, *Torts and Rights* (n 36), 327). This has led some commentators, mostly in other common law jurisdictions such as the US or Australia, to turn to other normative theories (such as civil recourse, enterprise liability and economic deterrence) to justify the goals of tort law (see, generally: John Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (OUP 2014)). Nevertheless, in England these theories remain of secondary importance, the strong focus being on corrective justice despite its (acknowledged) shortcomings.

¹⁹¹ Andrew Ashworth, ‘Was ist Positive Generalprävention? Eine Kurze Antwort’ in Friedrich Lösel *et al* (eds), *Positive Generalprävention: Kritische Analysen im Deutsch-Englischen Dialog* (1998), 68-69.

¹⁹² Victor Tadros, *The Ends of Harm: the Moral Foundations of Criminal Law* (OUP 2011), 89.

¹⁹³ See generally, Tadros (n 192), Chapter 2.

the communicative theory holds that the value of punishment resides in the communication of the censure imposed on the defendant's act, therefore justifying the infliction of stigma and participating in the reinforcement of social norms.¹⁹⁴ The importance of an effective communication finds its value in consequentialist theories of punishment, where the justification of punishment is grounded in its beneficial effects, one of which is deterrence. In recent years in England, influential writers such as Gardner and Tadros have suggested that deterrence is not merely an incidental benefit of punishment's main goal. They have elevated it from a function of the criminal law to a justification of its punitive aim.¹⁹⁵

F. The relationship between tortious and criminal wrongs

Stevens has developed a normative theory which interprets tort law as the embodiment of private rights, and criminal law as the regulation of public wrongs.¹⁹⁶ This is an interesting analysis because it distinguishes tort and crime whilst highlighting the connections that exist between both areas of law. Its principal claim is that tort is a legal account of interpersonal wrongs, which consist in the infringement of a person's primary rights. Stevens analyses tort law as a basic category, which the criminal law draws upon. The classic assertion that a wrong is a breach of duty¹⁹⁷ is followed by the identification of three categories of wrongs: personal (moral) wrongs, interpersonal wrongs (mainly torts), and public (criminal) wrongs.¹⁹⁸ These categories sometimes overlap.

Given that the existence of a duty does not necessarily imply the existence of a correlative right, the existence of such a right is verified by the right holder's ability to waive it and his control over whether to enforce it when it has been

¹⁹⁴ Ibid. For a prominent account of the communicative justice theory, see: Duff, *Punishment, Communication and Community* (n 171).

¹⁹⁵ John Gardner, 'The Functions and Justifications of Criminal Law and Punishment' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007); Tadros (n 192), Part IV: Punishment and the Duties of Offenders.

¹⁹⁶ See: Robert Stevens, 'Private Rights and Public Wrongs' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014). More generally: Stevens, *Torts and Rights* (n 36).

¹⁹⁷ See, for instance: Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1995), 33, 37.

¹⁹⁸ Stevens, 'Private Rights and Public Wrongs' (n 196), 113.

infringed.¹⁹⁹ Interpersonal wrongs are rights based, but public wrongs are not, insofar as the enforcement of criminal law duties is conferred upon a public official rather than the victim.²⁰⁰ Subject to limited exceptions, criminal law is in a relationship of dependence with tort law: wrongs that are classified as criminal (nearly) always involve an interpersonal wrong; the contrary is not true. Interpersonal wrongs are thus treated as a basic category, which the criminal law builds upon in order to determine whether the given wrong is sufficiently serious to warrant a public sanction.²⁰¹

Ultimately, Stevens argues that torts as *private rights*, because a breach of duty in tort involves the infringement of a correlative right, and the claimant chooses whether or not to bring a claim against the defendant. By contrast, he analyses crimes as *public wrongs*, because the existence of a correlative right is not necessary (hence the vesting of the choice whether to prosecute in the hands of the prosecution services). Criminalisation of conduct will depend on the public taking an interest in the wrong or on the articulation of a strong public policy argument in favour of criminalising conduct.²⁰²

This analysis is supported by the way in which English and French courts and legislators have approached defamation. As will be seen, the criminal regulation of defamation was originally necessary because of the wrong's potential to create disorders in the public arena. But societal changes have limited this potential disorder. Their effect has been substantial in England, leading to the abolition of criminal libel. It has been more limited in France, where decriminalisation

¹⁹⁹ Ibid, 114-17.

²⁰⁰ Ibid, 116-17. When discussing 'recourse', Stevens says that 'It is a characteristic of rights based duties that the rights holder has control over whether to enforce the right... This may be contrasted with the enforcement of criminal law duties. In the large majority of cases in the modern common law systems the choice whether to enforce a breach of a criminal law duty is conferred upon a public official.' Note, however, that this is less true of the French legal system, where the role of the victim is more prominent than in the common law tradition. The act of *constitution de partie civile* will trigger the investigation of the case by a *juge d'instruction* (examining judge); the victim can also summon the defendant. In this sense, the victim has greater control over whether a prosecution is brought. See generally Boré (n 176).

²⁰¹ Stevens, *Torts and Rights* (n 36), 121ff.

²⁰² In this sense: RA Duff and Stuart Green, 'Introduction: The Special Part and its Problems' in RA Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005), 8; Bernard Bouloc, *Droit Pénal Général* (23rd edn, Dalloz 2013), 6.

movements have encountered major resistance, leading to a privatisation of some aspects of the criminal wrong.²⁰³

VI. Conclusion

This chapter has provided the legal context for the study. It has delimited the project, outlined the English and the French laws of defamation, and given a brief summary of the tort/crime distinction.

By using the tort/crime framework as the lens through which to examine the law of defamation in England and France, the challenge of the comparison can be readily identified. The root of the issue of comparability lies in the apparent irreconcilability of the nature of the regulation with the current applicable rules. This tension is apparent in Chapters 3-5, which reflect on the discrepancy that exists between the general principles of tort and crime and their practical application in the English and French laws of defamation in light of the analysis in Chapter 2. Chapter 3 contrasts the tension between strict liability and fault in each system with the general rules on the role of fault in tort and criminal law. Chapter 4 notes how the traditional rules on truth are evolving in France, marking a departure from criminal law principles of punishment and growing closer to the English tortious ones and their compensatory goal. Finally, Chapter 5 goes beyond the official functions of tort and crime described above. It identifies an interpenetration of tortious and criminal remedial goals in English and French defamation claims, and establishes the emergence of a shared hybrid model of liability.

Throughout the thesis, commonalities in the English and French laws of defamation will emerge. These commonalities challenge some general principles of tort and criminal law, and ground the argument that England and France share a common conceptual approach to defamation. While substantive differences

²⁰³ On the criminal regulation of the French wrong of defamation, see Chapter 2: The framework of defamation liability in comparative historical perspective. The privatisation of the French wrong will be considered throughout the thesis, most importantly in Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation and Chapter 6: Conclusions, III.

remain, the recognition of a shared conceptual approach suggests that the apparent link existing between the nature of the regulation and the substantive content of the rules on defamation in England and France can be challenged.

CHAPTER 2

THE FRAMEWORK OF DEFAMATION LIABILITY IN COMPARATIVE HISTORICAL PERSPECTIVE

I. Introduction

On a cursory view, the way in which the English and French wrongs of defamation are constructed appears to differ significantly. The most noticeable differences are the nature of the regulation (tortious or criminal) and the existence (or absence) of a sub-division of the wrong into oral and written defamation. The primary purpose of this chapter is to examine the framework of defamation liability in England and France, understood to cover the nature of the liability, the internal structure of the wrong and its position on the national legal maps. I argue that structural differences between the two systems are not fundamental ones; to the contrary, I identify a common spirit in the way in which the English and French rules on defamation are structured within the areas of tort and criminal law. The chapter also has a secondary purpose, which is to preface the subsequent comparison by a clear presentation of the English and French frameworks of liability. This is necessary because the nature of the regulation dictates the relevant terminology and applicable doctrines. In turn, this impacts our reasoning since the same concept may have different meanings in tort and in crime.¹

First, I briefly consider the historical evolution of defamation liability in England and France. Second, I examine why each jurisdiction has come to impose civil or criminal liability in respect of the wrong of defamation; the historical section will inform my analysis of the disparate regulatory features. Finally, I analyse the extent to which this disparate regulatory structure has affected the doctrinal conceptualisation of the wrong in each system. In my conclusion, I reflect on the relevance of my findings for the comparative analysis in the following chapters.

¹ For instance, intention has a different meaning in tort and criminal law. See Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIA.

II. The historical evolution of the nature of defamation liability

It is uncontroversial to say that comparative law involves an historical element.² This is because the historical circumstances under which the legal institutions came to be undoubtedly have much to say about the logic underlying the current state of affairs. In this section, I offer a brief retrospective of the historical evolution of the nature of defamation liability in England and France, as a necessary first step towards understanding the regulatory features.

French doctrinal writers have largely ignored this subject, and there is no standard work on the history of the law of defamation. What follows is a first step towards filling this gap, based on some modern sources,³ foundational historical treatises⁴ and the preliminary works which preceded the adoption of the law of 29 July 1881.⁵ By contrast, various works have meaningfully engaged with the historical development of the English wrong.⁶ However, they have tended to approach the subject chronologically; or to focus on a specific aspect of

² Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press; OUP 1998), 8.

³ Some useful sources are: Bernard Beignier, *L'Honneur et le Droit* (LGDJ 1995); Guillaume Lécuyer, *Liberté d'Expression et Responsabilité* (Dalloz 2006); Bernard Beignier et al, *Traité de Droit de la Presse et des Médias* (Litec 2009).

⁴ The major ones being: François Dareau, *Traité des Injures dans l'Ordre Judiciaire: Ouvrage qui Renferme Particulièrement la Jurisprudence du Petit-Criminel* (Praul père 1775); E A T Grellet-Dumazeau, *Traité de la Diffamation, de l'Injure et de l'Outrage* (E Leboyer; Joubert 1847).

⁵ Henry Celliez and Charles Le Senne, *Loi de 1881 sur la Presse, Accompagnée des Travaux de Rédaction* (Marescq Aîné 1882).

⁶ In England, foundational books are Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Pub 2005); Richard H Helmholz (ed) *Select Cases on Defamation to 1600*, vol 101 (Selden Society 1985). Many books covering the development of English law have dedicated a section to defamation, for instance: Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (Butterworth 1956); W S Holdsworth, *A History of English Law*, vol 5 (3rd edn, Methuen 1945); S F C Milsom, *Historical Foundations of the Common Law* (Butterworths 1969); John H Baker, *An Introduction to English Legal History* (Butterworths 1979); R H Helmholz and John H Baker, *The Oxford History of the Laws of England*, vol VI (OUP 2003). Further, there exist various articles, most of which are found in US journals, which have engaged with the development of the law of defamation. See, for instance: Veeder van Vechten, 'The History and Theory of the Law of Defamation. I' (1903) 3 Colum L R 546; Veeder van Vechten, 'The History and Theory of the Law of Defamation. II' (1904) 4 Colum L R 33; Richard C Donnelly, 'History of Defamation' (1949) 99 Wisc L R 99.

the development of the wrong,⁷ such as the distinction between libel and slander.⁸ No author has offered an historical retrospective focusing on the nature of the regulation. It is from this angle that I present the development of the wrong of defamation, in England and France.

A. English law

The origins of the English law of defamation have been traced back to a variety of sources as diverse as the Bible, Roman law and the Anglo-Saxons.⁹ The earliest known pieces of regulation are a decree of Alfred the Great in 880¹⁰ and a provincial Constitution of the Council of Oxford in 1222, *Auctoritate dei Patris*, which provided for the excommunication of any person maliciously imputing a crime to another.¹¹ In fact, the coexistence of ecclesiastical and secular justice in early Medieval England meant that two levels of jurisdiction gave remedies for slander: ecclesiastical courts and local courts, which would ultimately be replaced by common law courts.¹² The scope of their jurisdiction differed,¹³ and a finding of liability could lead to various outcomes, from harsh physical punishments to other remedies such as apologies or awards of damages, since the common law action focused on the protection of the economic interests

⁷ Some articles have focused on specific jurisdictions: David Hewitt, 'Some Cases from the Defamation Jurisdiction of the Archdeaconry of Richmond' (1998) 19 JLH 251; others on specific institutions: E P Cheyney, 'The Court of Star Chamber' (1913) 18 The American Historical Review 727; others on the linguistics of defamation cases: W R Jones, 'Actions for Slander: Defamation in English law, Language, and History' (1971) 57 Q J Speech 274, Roger W Shuy, *The Language of Defamation Cases* (OUP 2010); others on a specific type of defamation: S M Waddams, *Sexual Slander in Nineteenth-Century England: Defamation in the Ecclesiastical Courts, 1815-1855* (University of Toronto Press 2000); Antoon De Baets, 'Defamation Cases Against Historians' (2002) 41 Hist Theory 346.

⁸ See below, 185.

⁹ Peter Frederick Carter-Ruck, *Libel & Slander* (Faber & Faber 1972), 34ff.

¹⁰ Colin Rhys Lovell, 'The "Reception" of Defamation by the Common Law' (1962) 15 Vand L Rev 1051, 1052-53.

¹¹ Helmholz (n 6), xiv; xxvi.

¹² As a result of the institutionalisation of the common law by Henry II in 1154 and the regular journeys of judges to establish a common legal system throughout the realm, the local courts were gradually absorbed into the new system and replaced by the common law courts: see Baker (n 6), 22.

¹³ The ecclesiastical courts exercised jurisdiction over matters such as scandalous gossip, obscene and abusive expressions, with the goal of punishing the sinner for the benefit of his soul. The local courts exercised jurisdiction not only over insults directed to the offended person, but also over abusive language addressed to a third party which tended to lower the offended person's reputation.

of the claimant.¹⁴ The wrong was then underdeveloped as compared to its modern version. Commonly labelled ‘slander’, it did not distinguish between oral or written, civil or criminal defamation.¹⁵ In fact, in some cases before 1600 the courts even treated slander as a kind of assault or an element of physical trespass.¹⁶ This was probably inherited from the Roman law understanding of *iniuria*, which treated the protection of *corpus* (physical integrity) and *fama* (reputation) on an equal level.¹⁷ Thus, words spoken whilst performing an act would be treated as defamation committed by gesture.

1. The distinction between civil and criminal defamation

In 1275, the unrest following the Barons’ Wars led to the enactment of the statute of Westminster I, also known as *de scandalum magnatum* (slander of magnates).¹⁸ Primarily political in nature, it was designed to prevent loss of confidence in the government due to discord generated by the spreading of false news or slander of the great men of the realm. Seldom used at that point, it would later provide the foundations for the development of the law of libel.¹⁹

With the invention of printing in the 15th century, breaches of the public peace caused by duelling increased dramatically, and the risks of the printed press became obvious to the monarchy. In response to this risk, the Tudors established a system of prior restraints, granted themselves a power to seize the materials and imposed a restriction on the number of presses. As the censorship power passed on from the ecclesiastical power to the Crown, the criminal aspect of

¹⁴ Local and ecclesiastical courts broadly applied the same law of defamation. However, the former approached the wrong as a form of trespass; a successful action would result in a remedial award benefiting the claimant. By contrast, a successful action in the ecclesiastical courts resulted in a punishment in the form of excommunication, which was not intended to benefit the claimant. However, this had little if any practical difference since the restoration to communion involved making suitable amends which could be sought before the ecclesiastical jurisdiction: the end result was similar but the means to achieve it varied. See: Helmholz (n 6), xv-xvi; xlixff.

¹⁵ Law Commission, *Working Paper No. 84, Criminal Libel* (1982), 2.3.

¹⁶ Helmholz (n 6), 1.

¹⁷ In this sense: Eric Descheemaeker and Helen Scott, ‘*Iniuria* and the Common Law’ in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law* (Hart Pub 2013), 14, in which *corpus* and *fama* are described as reverse sides of the wrong of *iniuria*.

¹⁸ 13 Edw 1, c 34.

¹⁹ Van Vechten, ‘The History and Theory of the Law of Defamation. I’ (n 6), 554-55.

scandalum magnatum became regulated by the Privy Council. From 1559 onwards, it became the role of the Privy Councillors sitting in the Star Chamber²⁰ to punish breaches to the public peace and seditious words. Anxious to suppress duelling, the court 'would punish defamatory libels on private citizens who had suffered insult thereby, in the hope that this remedy would be more attractive to the person insulted than the issue of a challenge to fight.'²¹ This was in contrast with the compensatory goal of civil claims outlined above.

Until the beginning of the 17th century, *scandalum magnatum* was the main resource used by the Star Chamber to fashion the law of libel. In 1606, however, the case *de libellis famosis* marked the creation of a formal offence of criminal libel. This offence encompassed various types of libel (seditious, blasphemous and defamatory) and was divided into two classes: political libels (posing a threat to the security of the state) and private libels (likely to cause private disorders).²² Partially incorporating the Roman institution of *libellus famosus* by criminalising written statements,²³ the case highlights the purpose of the court as being one of punishment, with little focus on the damage suffered by the offended person.²⁴ Thus, the criminal jurisdiction of the Star Chamber in respect of defamation ran alongside the civil one of the common law courts, in which the gist of the action was the damage suffered by the claimant rather than the threat to the peace.²⁵

²⁰ Established in 1488, the court of Star Chamber was a specific session of the Privy Council, during which it sat as a court of justice exercising judicial rather than administrative powers, and possessed a power of punishment. Cheyney points out that the sole difference 'between the ordinary meetings of the Privy Council and the Court of Star Chamber was not a difference of men, but a difference of time and place of sitting, of procedure, and above all of functions.' See Cheyney (n 7), 728.

²¹ Holdsworth (n 6), 210.

²² *Working Paper No. 84, Criminal Libel* (n 15), 2.5.

²³ Donnelly points out that 'the Roman *libellus famosus* was based, not upon the form of the publication, but upon the character of the matter published, its anonymous nature, and the extent of its diffusion. In adopting *libellus famosus*, the Star Chamber ignored its Roman limitations and for the first time introduced into the English law a new type of defamation based upon mere form with the additional principle that a libel is punishable as a crime because it tends to a breach of the peace.' See: Donnelly (n 6), 118.

²⁴ Plucknett (n 6), 454, 457.

²⁵ *Working Paper No. 84, Criminal Libel* (n 15), 2.3.

2. *The distinction between oral and written defamation*

The Star Chamber was abolished by act of Parliament in 1641;²⁶ much of its work was then incorporated into the common law. The courts that had developed the civil law of defamation thus began to administer the law of criminal libel developed by the Star Chamber. This marked the beginning of the creation of specific rules for libel. Treated both as a crime and as a tort, its regulation was heavily based in the civil rules devised by the common law courts; but, following the criminal rules of the Star Chamber, it did not require that special damage be proven. Donnelly suggests that this special rule originated in the fact that written defamation was a crime threatening the public peace. Establishing a presumption of damage effectively added to the pre-existing arsenal of censorship.²⁷

This distinction between spoken and written defamation was first laid down in the case of *King v Lake*,²⁸ and formalised in the later case of *Thorley v Kerry*.²⁹ The permanent or transient character of a statement would imply a different degree of gravity, thus calling for the application of different rules and remedies: the distinction between libel and slander was born.

3. *The coexistence of civil and criminal defamation*

At that time, civil and criminal defamation coexisted. While it was clear that spoken defamatory words could never constitute a crime,³⁰ a written statement could constitute either a tort or a crime. Of the two classes of criminal libel, political ones became obsolete by the end of the 18th century. By then, the function of juries had gradually become so restricted in favour of judges so as to be limited to examining the issue of publication. In 1792 Fox's Libel Act put an end to this state of affairs by enabling the jury to give a verdict on the whole matter put in issue. Thereafter, prosecutions for political libel rarefied to the

²⁶ Abolition of Star Chamber Act 1641.

²⁷ Donnelly (n 6), 121.

²⁸ *King v Lake* (1667) 145 ER 552, (1667) Hardres 470.

²⁹ *Thorley v Kerry* (1812) 128 ER 367, (1812) 4 Taunt 355.

³⁰ By contrast, seditious or blasphemous spoken words were indictable. See: *Working Paper No. 84, Criminal Libel* (n 15), 2.7.

point of obsolescence.³¹ Private libels survived for a longer period of time, until the enactment of a series of statutory reforms in the second half of the 19th century.³² These were propelled by the pressure of newspaper proprietors and editors who opposed first some details of the law (which they alleged was not sufficiently protective) and later the very principle of criminal liability. In 1888, the Law of Libel Amendment Act made the leave of a judge in chambers a prerequisite for a prosecution for libel against anyone; after which prosecutions for libel became increasingly infrequent.³³

4. The modern wrong

In parallel to the gradual decline of criminal libel, 20th century statutory reform in the form of the 1952 and 1996 Defamation Acts was solely concerned with civil defamation. By the second half of the 20th century it had become clear that proceedings for criminal or defamatory libel were very infrequent.³⁴ The last prosecutions for libel were held in the 1970s. Over that period, the Crown prosecuted only three offences. Of the three defendants, one received a sentence of six months, the other a suspended sentence and the third a conditional discharge.³⁵

The reason for this was the existence of serious inadequacies in the law of criminal libel. These defects were analysed in detail in the Law Commission's Working Paper on criminal libel.³⁶ They can be classified into three broad categories. First, although there existed a threshold of seriousness to criminal libel claims, the notion was lacking in clear contours and so was ineffective.³⁷ Second, some rules of criminal libel were inconsistent with the general principles of criminal law. Intention to defame was not always necessary to ground

³¹ Ibid, 2.9.

³² Libel Act 1843, Newspaper Libel and Registration Act 1881, Libel Amendment Act 1888.

³³ Law Commission, *Report No. 149, Criminal Law: Report on Criminal Libel* (1985), 2.3.

³⁴ Ibid.

³⁵ Ibid, 2.3.

³⁶ *Working Paper No. 84, Criminal Libel* (n 15), Part IV.

³⁷ Ibid, 6.10.

liability, so that criminal libel was in some respects a crime of strict liability.³⁸ Further, the presumption of falsity imposed a reverse burden of proof as to truth on the defendant, which was unacceptable in a criminal context.³⁹

Finally, there existed unjustifiable discrepancies between the criminal wrong and its civil counterpart. Newspaper proprietors were granted special protection against criminal proceedings, but were treated as ordinary defendants in the tort of defamation. The Civil Evidence Act 1968 only applied to civil actions, with the result that fewer matters were admissible in evidence in criminal libel prosecutions.⁴⁰ More fundamentally, the scopes of the criminal and civil wrongs did not tally. Slander was only actionable in tort;⁴¹ yet, criminal libel had a much wider scope than the tort of defamation. There were two reasons for this. First, truth was only admissible in criminal libel when coupled with an element of public benefit, and did not act as a complete defence.⁴² Second, the changes brought in by the 1952 Act, which broadened the scope of defences in civil actions, were not applicable to criminal libel.⁴³ That state of affairs was problematic. It was in direct conflict with the normative distinction between tort and crime which I endorsed in the previous chapter.⁴⁴ According to it, criminal law is in a relationship of dependence with tort law: the former builds upon the latter when the wrong is sufficiently serious to warrant a public sanction. So as a general rule, the tort must be wider than the corresponding crime, because punishment is only imposed for the most serious offences.

Overall, these defects rendered the law of criminal libel inappropriate, and posed a risk of conflict with the provisions of the European Convention on Human Rights.⁴⁵ The collision between the rules on criminal libel and the promotion of freedom of expression, and the consequent risk of creating a ‘chilling effect’ on

³⁸ Ibid, 6.7.

³⁹ Ibid, 6.9.

⁴⁰ Ibid, 6.13-6.15.

⁴¹ Ibid, 6.12.

⁴² Ibid, 6.4.

⁴³ Ibid, 6.5-6.6.

⁴⁴ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VF.

⁴⁵ *Working Paper No. 84, Criminal Libel* (n 15), 6.11.

freedom of expression were highlighted in submissions made to Parliament before the passage of the 2013 Act.⁴⁶

Various attempts were made to reform the offence. In 1982, the Law Commission provisionally suggested the abolition of the common law offence of criminal defamation and its replacement by a more limited statutory offence.⁴⁷ In 1985, it proposed a draft Criminal Defamation Bill,⁴⁸ which was never implemented. Walker suggests that the neglect in usage of the crime and in any determination to modernise it favoured the path of abolition.⁴⁹ Another factor contributing to tilting the balance in favour of abolishing criminal defamation was the idea that England should lead by way of example. While criminal libel was effectively moribund and unlikely to be resurrected, its preservation gave legitimacy to foreign criminal offences of defamation.⁵⁰ This is attested by the comment made by Justice Minister Claire Ward on the day when the Act abolishing criminal defamation came into effect:

‘Sedition and seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn’t seen as the right it is today... Abolishing these offences will allow the UK to take a lead in challenging similar laws in other countries, where they are used to suppress free speech.’⁵¹

The common law offences of criminal libel, including defamatory libel, were eventually abolished by section 73 of the Coroners and Justice Act 2009. Nowadays, although there exist other criminal wrongs which offer ancillary

⁴⁶ House of Commons: Culture Media and Sport Committee, *Press Standards, Privacy and Libel* (2010), 233.

⁴⁷ *Working Paper No. 84, Criminal Libel* (n 15), Part VIII.

⁴⁸ *Report No. 149, Criminal Law: Report on Criminal Libel* (n 33), Appendix A.

⁴⁹ Clive Walker, ‘Reforming the Crime of Libel’ (2005) 50 N Y L Sch L Rev 169, 179.

⁵⁰ *Press Standards, Privacy and Libel* (n 46), 234.

⁵¹ See: PA Media Lawyer, ‘Criminal libel and sedition offences abolished’ (*PressGazette*, 13 January 2010) <www.pressgazette.co.uk/node/44884> accessed 11 June 2015.

protection to the right to reputation,⁵² English law solely regulates defamation as a tortious wrong.

B. French law

In France, the law of the *Ancien Régime* derived from two main sources: Roman law, as it was rediscovered by the Universities in the Middle Ages and the Renaissance, and barbarian laws⁵³ applied in the Frankish era.⁵⁴

The word defamation is not found in any barbarian laws, and the concept was unfamiliar to most of them.⁵⁵ However, the best known of these barbarian laws in force in the Frankish Empire, the Salic law, contains eight articles dedicated to the regulation of what it labels *injures* (injurious words).⁵⁶ These articles regulated various imputations and set up a form of monetary compensation.⁵⁷ The law also allowed a defence of truth in some (but not all) such instances.⁵⁸

The complex evolution of the French legal system from the Frankish Empire to the *Ancien Régime* was marked by the dual influence of Christianity and Roman law. Canonists studied the works of Catholic theologians, who were influenced by the Greco-Latin culture and acknowledged the inheritance of Roman law principles. University scholars rediscovered and studied the works of Roman jurists. The jurists thus drew on Roman law and remodelled its solutions to

⁵² See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIA2.

⁵³ The label of '*lois barbares*' (barbarian laws) is commonly used in French law to designate the laws of the Germanic peoples that settled in the provinces of the Roman Empire from the 4th century onwards. See Jean-Marie Carbasse, *Histoire du Droit Pénal et de la Justice Criminelle* (3rd edn, PUF 2014), 42.

⁵⁴ Jacques Ghestin and Geneviève Viney, *Traité de Droit Civil. Introduction à la Responsabilité* (3rd edn, LGDJ 2008), 9.

⁵⁵ Léon-Édouard Courtel, 'Essai sur la diffamation : thèse pour le doctorat' (1873), 175.

⁵⁶ Loi salique, Heading XXXII, 'Des Injures': <http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/loi_salique.htm> accessed 23 September 2015. Heading LXVII regulates another type of statement, in which one person accuses someone else of being a poisoner.

⁵⁷ For instance, art. 1 established a monetary sanction for calling someone *infâme* (vile).

⁵⁸ The defence was allowed for arts. 7 and 8, that is for the cases in which the defendant had called the claimant a *dénonciateur* (informer) or a *faussaire* (forger), and could not justify these imputations.

integrate Christian values of moral responsibility in their legal rules.⁵⁹ Consequently, the regulation of defamation in the *ancien droit* mirrors one aspect of the Roman law of *iniuria*.⁶⁰ A general category of *injures* (the French translation of *iniuria*) regulated a variety of wrongs including verbal or written attacks, *médiances* (slandorous statements) and *calomnies* (calumnies, which specifically regulated false statements imputing an act to somebody who did not commit it).⁶¹ The penalty sanctioned attacks to the public peace⁶² and a person's reputation;⁶³ just as in Roman law, no distinction was made between civil and criminal liability.⁶⁴

1. The distinctions based on the means of commission and the seriousness of the injure

As was the case in the Roman law of *iniuria*,⁶⁵ the wrong could be committed in three different ways: *re* (by another act), *verbis* (by spoken words) or *litteris* (in writing, which was in essence an aggravated form of *verbis*).⁶⁶ The applicable rules were the same regardless of the means by which the wrong was committed.⁶⁷ However, the law would distinguish *injures* based on their seriousness: they could be minor, serious or atrocious. The two distinctions did

⁵⁹ Viney, *Traité de Droit Civil* (n 54), 11.

⁶⁰ It should be made clear that the Roman law of *iniuria* was much wider in scope than the French law of defamation. What might be labelled a 'Roman law of defamation' was only a section of the Roman law of *iniuria*. It was represented by the specialised edict '*ne quid infamandi causa fiat*', itself a part of the more general law of *iniuria* as unified by the concept of *contumelia* (commonly understood as contempt). For a good retrospective of the development and scope of *iniuria*, see: Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP, Clarendon Press 1996), specifically Part VIII; also see a more succinct account in Descheemaeker and Scott (n 17).

⁶¹ Later, Dumazeau would write that *calomnies* should not be confused with *diffamation*. The former related to untruthful statements, whereas the former would relate to *any* statement imputing an act to a person, whether or not this person did in fact commit the act. *Diffamation* was not necessarily a lie, whereas *calomnie* was. See: Grellet-Dumazeau (n 4), 7.

⁶² M Guyot (ed) *Répertoire Universel et Raisonné de Jurisprudence*, vol 19 (Garnery 1778), 155.

⁶³ Dareau (n 4), 3.

⁶⁴ Viney, *Traité de Droit Civil* (n 54), 68-70. The first formal distinction appears in 1795 in arts. 5 and 6 of the Code des délits et des peines de Brumaire (the ancestor of the Criminal and Criminal procedure codes): '*L'action publique a pour objet de punir les atteintes portées à l'ordre social*', '*L'action civile a pour objet la réparation du dommage que le délit a causé.*'

⁶⁵ See Descheemaeker and Scott (n 17).

⁶⁶ Dareau (n 4), 4, 34; Hervé Piant, 'La Justice au Service des Justiciables? La Régulation de l'Injure à l'Époque Moderne' (2011) 40 *Rives méditerranéennes* 67, 70-71.

⁶⁷ See, generally: Dareau (n 4).

not tally; thus, at the end of the 18th century *injures* committed *re* would be classified as minor, insofar as they had become infrequent.⁶⁸ The seriousness of the wrong was dictated by the factual circumstances of its commission. It was assessed by reference to various factors such as the offended person's social standing; the place where and moment when the wrong was committed; the means of and motivation for its commission; and any recidivism by the offender.⁶⁹

2. *The distinction between civil and criminal defamation*

In the absence of any codification of the provisions on *injures*, in the late 18th century doctrinal writers tried to synthesise the existing law. It was set out in a section of Jousse's *Traité de la justice criminelle en France* in 1771;⁷⁰ later, Dareau dedicated a whole book to the wrong,⁷¹ and the law was effectively summarised in 1778 in Guyot's *Répertoire universel et raisonné de jurisprudence*.⁷² The study of the texts shows that *injures*, *calomnies*, *médiances* and *diffamations* were not distinguished from one another. Dareau's treatise refers to a royal ordinance grounding liability for all statements of a defamatory nature,⁷³ and the *Répertoire* considers that both *calomnies* and *médiances* can form the basis of a defamation claim.⁷⁴ While there existed no formal distinction between the various wrongs, there are indications that *injures* were regulated both as a private dispute and as a threat to the public peace. Indeed, Dareau notes that:

‘*L’action pour fait d’injures est de deux sortes : l’une civile, quand on en vient par simple assignation devant le juge ;* The claim for *injures* is of two sorts: one is civil, when one appears by summons before the judge; and the

⁶⁸ Ibid, 390.

⁶⁹ Ibid.

⁷⁰ Daniel Jousse, *Traité de la Justice Criminelle de France*, vol 3 (Debure père 1771), Partie IV, Titre XXIV.

⁷¹ Dareau (n 4).

⁷² Guyot (n 62).

⁷³ Dareau (n 4), 37.

⁷⁴ Guyot (n 62), 163.

& l'autre criminelle, lorsqu'on prend other criminal, when the chosen route
la voie de la plainte et de is that of complaint and judicial
l'information.'⁷⁵ inquiry.

The choice was left to the claimant, although there are indications that spoken *injures* were generally considered to be a private matter unless the difference in the parties' social standing threatened the public order. This was because from the beginning of the 16th century onwards, one's honour would often be restored through a duel.⁷⁶ Conversely, in the case of *injures* committed *re*, physical harm was the primary concern of the judge; since it was often minor, it would generate little (if any) compensatory awards, thus making the criminal option more attractive than its civil counterpart. The available remedies differed. A successful civil claim would often result in an *amende honorable*. This procedure aimed at restoring the claimant's honour; it often took the form of an apology, oral or written, and had the dual aim of punishing the defendant and vindicating the claimant's reputation.⁷⁷ This was sometimes coupled with compensatory damages that could also be awarded independently of any other remedy, but focused on the claimant's economic losses – often consequential to his physical injuries, in cases of *injures* committed *re*. Criminal claims would result in a sanction consisting of a fine and costs.⁷⁸

3. The 19th century prevalence of criminalisation

On 26 August 1789, the Declaration of the Rights of Man and of the Citizen was adopted, proclaiming freedom of opinion and of expression in articles 10 and 11. Under the laws that were adopted immediately after the Revolution (*droit*

⁷⁵ Dareau (n 4), 394.

⁷⁶ Henri Morel, 'La Fin du Duel Judiciaire en France et la Naissance du Point d'Honneur' (1964) 19 RHD 574ff considers the transition from the *duel judiciaire* (legal duel) to the *duel d'honneur* (honour duel). The *duel judiciaire* was a dispute resolution mechanism that existed in France until the 15th century. It was then believed that God would stand alongside the just man, as a consequence of which the innocent party would necessarily win the fight. It was gradually replaced by the *duel d'honneur*, which was no longer a legally approved mechanism, but rather a private means of settling a dispute, which led to numerous breaches of the peace. See: Carbasse (n 53), 47, 113.

⁷⁷ Dareau (n 4), 152 *bis*.

⁷⁸ See, generally: Piant (n 66), 74-85. This also included any appropriate monetary relief awarded through the *action civile* procedure.

intermédiaire), cases suggest a prevalence of civil claims over criminal ones.⁷⁹ The regulation of defamation was existent but imperfect; because its scope was unclear and extremely complicated, many instances of defamation actually fell outside the scope of the legal regulation.⁸⁰

In the fifth year of the Republican era (1796-1797), the Council of Five Hundred adopted a project on the civil wrongs committed through the press. It first used the word *diffamation* to describe the concept as it is known today, defining it *a contrario* by opposing it to that of calumny. Following the rejection of the project, the concept of defamation only appeared in an enacted text in the 1810 Criminal code (although it was still not named as such). Article 367 punished the public imputation of criminal wrongs or defamatory facts, the truth of which could not be proven, and which could expose the subject of the statement to criminal proceedings or generally to the contempt or hatred of society. The only aim of article 367 proceedings was to punish the breaches of the public peace.

The criticism voiced against such a regulation⁸¹ resulted in the enactment of the three *lois de Serres* of 17 May, 26 May and 9 June 1819, which aimed at liberalising the rules applicable to the press.⁸² Indeed, they replaced the pre-existing preventative system of authorisation by a repressive regime: the control was made from an *ex post* rather than an *ex ante* perspective. From that moment onwards, by reason of a combination of factual circumstances rather than through a reasoned normative choice, the law of defamation merged with the law on the press.

⁷⁹ Aristide Douarche, *Les Tribunaux Civils de Paris Pendant la Révolution (1791-1800)*, vol I (Léopold Cerf 1905), CXCV-CC.

⁸⁰ Pierre Achille Morin, 'Répertoire Général et Raisonné du Droit Criminel' (1850) 1 under *diffamation*.

⁸¹ Falsity was presumed (art. 370), and more generally anything that did not live up to the high standard of judicial evidence was considered to be false and to constitute a calumny. This system was strongly condemned for being both unfair (once a fact had been established according to the legal system of proof, it would represent a lifetime menace for the individual) and wrong (anything that was not authenticated was considered to be a calumny, for the sole reason that it was not legally proven, whatever the actual merit of the claim).

⁸² *Loi du 17 mai 1819 sur la responsabilité encourue par la voie de la presse ou par tout autre moyen de publication; loi du 26 mai 1819 sur le régime procédural applicable à leur poursuite; loi du 23 juin 1819 sur la publication et ses conditions administratives*. These are typically referred to as *lois de Serres*, after the person who presented them to the French parliament.

The *lois de Serres* were the first to define *diffamation* as a standalone wrong, distinct from the other category of *injures*, as:

‘[Une] *allégation ou imputation d’un fait qui porte atteinte à l’honneur ou à la considération de la personne.*’⁸³ Any allegation or imputation of a fact which undermines the honour or esteem of the person.

Central to this definition are the notions of *honneur* and *considération*. The distinction between both is uncertain, although le Poittevin’s argument that *honneur* is what the claimant thinks he is, by contrast with *considération* which is what others think the claimant is,⁸⁴ has been endorsed by contemporary doctrinal writers.⁸⁵ Others have argued that *honneur* is the source of *considération*.⁸⁶ Regardless of this semantic debate, what is certain is that the terminology carries with it notions of rank and status,⁸⁷ and consequently designates defamation as a societal wrong. It therefore confirms that defamation is thought to be a wrong that has consequences for the public as a whole, which warrant criminalisation.⁸⁸

The *lois de Serres* considered that liability attached to the offender’s intention in committing the act, regardless of the means employed to do so. Therefore, they did not differentiate between oral and written defamation.⁸⁹ However, a distinction was established between public and private defamation. Under the law of 17 May 1819 (as would ultimately be the case in the 1881 law),⁹⁰ the concept of publication was not understood in a literal sense. Rather, article 1 listed the ‘means’ by which publication was characterised for the purposes of the

⁸³ Art. 13 of the Law of 17 May 1819.

⁸⁴ Gustave le Poittevin, *Traité de la Presse*, vol 2 (Larose & Forcel 1903).

⁸⁵ See, for instance: Philippe Conte, *Droit Pénal Spécial* (Litec 2003), 408.

⁸⁶ Lécuyer (n 3), 68.

⁸⁷ See above, IIB2.

⁸⁸ See further Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IIIA.

⁸⁹ *Exposé des Motifs des Lois de Serres* (preparatory works to the *lois de Serres*), cited by Celliez and Le Senne (n 5), 9.

⁹⁰ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IVA2a).

law. Because they threatened public peace, these public statements were considered to be dangerous and to consequently require severe treatment.⁹¹ As a result, whereas non-public statements were regulated by the ordinary provisions of the 1810 Criminal code, public statements were regulated by the special provisions of the 1819 laws. The applicable penalties were imprisonment and/or a fine. As is the case in the 1881 law, instances of defamation directed at public institutions or public officials were punished more severely than simple cases of defamation of private individuals. The duration of imprisonment varied from five days to eighteen months, and the amount of the fine ranged from twenty to four thousand francs.⁹² In parallel to the public action, the victim could bring an *action civile* in order to obtain civil damages during the criminal process.⁹³

4. *The modern wrong*

The soundness of the analytical framework of the 1819 laws preserved their definition of defamation throughout the 19th century legislative changes and led to its enactment in article 29 of the law of 29 July 1881, which established a new administrative and criminal regime for the regulation of the press.

The application of article 1382 of the Civil code, the central provision grounding civil liability in French law, was not excluded by the laws of 1819 or by that of 29 July 1881. Under the regime established by the laws of 1819, and for about a century after the enactment of the 1881 law, criminal and civil responsibility coexisted peacefully.⁹⁴ However, the general principle of responsibility formulated in article 1382 was at odds with the special regime established by the 1881 law, and was bound to conflict with it. Indeed, the civil law gives a very broad definition of what constitutes a civil wrong; by contrast the criminal law is obliged by the *principe de légalité criminelle* (principle of legality) to always

⁹¹ Celliez and Le Senne (n 5), 12.

⁹² Arts. 15-18 of the law of 17 May 1819, which sets out the substantive rules regulating press wrongs.

⁹³ The law of 26 May 1819, which sets out the procedural rules applicable during the prosecution and trial of press wrongs, makes various references to the victim's *action civile*. See for instance arts. 10, 17, 29.

⁹⁴ Viney, *Traité de Droit Civil* (n 54), 144.

give a precise definition of the wrong and its constituent elements. As such, the law on the press established a set of precise rules providing a regime favourable to the defendant, with a short limitation period and special provisions in respect of invalidity proceedings and defences. The parallel application of article 1382 with its broad definition threatened to render the 1881 law empty of substance by circumventing the application of its special provisions.⁹⁵

A preference for the rules of the law of 29 July 1881

The first signs of a preference for the specific rules of the law of 29 July 1881 appeared when the *Cour de cassation* ruled that the law of 23 December 1980 would not apply to the press wrongs. Up until then, according to the *principe de solidarité des prescriptions civile et pénale*, a victim's *action civile* remained time-barred according to the public prosecution limitation period. The 1980 law, codified in article 10 of the Criminal procedure code, put an end to this rule. As a principle, *actions civiles* are now time-barred according to the civil law limitation periods, rather than the criminal law ones. Since the 1980 law was designed to be of general application, its effect in respect of press wrongs should have been to apply different limitation rules to the prosecution and the victim's *action civile*. Therefore, the *action civile* would not have been subjected to the short three-month prescription period established in article 65 of the 1881 law.

Contrary to this, shortly after the enactment of the 1980 law, the *Cour de cassation* considered that it would not apply to the press wrongs. Therefore, an *action civile* attaching to a press wrong remains time-barred according to article 65 of the law of 1881.⁹⁶ The judges grounded their reasoning in the wording of article 65, which provides that the short limitation period applies to both the *action civile* and the prosecution. Dreyer notes that this reasoning is absurd. The original purpose of article 65 was simply to recall the *principe de solidarité*

⁹⁵ Beignier *et al* (n 3), 1221.

⁹⁶ Cass civ (2), 20 April 1983, Bull civ 1983, II, n° 97; Cass civ (2), 13 June 1985, Bull civ 1985, II, n° 120.

which was in force at the time the 1881 law was enacted, but has since been repealed by the 1980 law itself.⁹⁷

The *Cour de cassation*'s interpretation was nonetheless followed and extended. Later cases declared that article 65 is not the only procedural rule of the 1881 regime that applies to *actions civiles* attaching to press wrongs.⁹⁸ To the contrary, these *actions civiles* are subjected to all the procedural rules of the 1881 law. The first civil chamber of the *Cour de cassation* has recently formalised this state of affairs by ruling that any *action civile* attaching to a press wrong must be based exclusively on the law of 29 July 1881 rather than on article 1382 of the Civil code.⁹⁹ This ensures the systematic application of the entirety of its defendant-friendly procedural rules.

Total exclusion of article 1382 at the beginning of the 21st century

A movement to exclude the civil liability based on article 1382 for press wrongs then followed in substantive law. A trend in doctrinal opinion convinced the judges that the conflict between the scopes of the law on the press and article 1382 required the latter to become inapplicable in the context of press wrongs in order to protect freedom of expression and freedom of the press.¹⁰⁰ The earliest cases to exclude civil liability considered that the application of the 1881 law depended on whether the *actus reus* of a press wrong was characterised, regardless of the defendant's *means rea* (specifically, intention). If it did, the application of article 1382 was excluded,¹⁰¹ potentially leaving the claimant without a remedy when the *mens rea* was not characterised.¹⁰² In later cases,

⁹⁷ Emmanuel Dreyer, 'Disparition de la Responsabilité Civile en Matière de Presse' (2006) 2006(20) D 1337.

⁹⁸ For a comprehensive list of these cases, see: Geneviève Viney, 'La Sanction des Abus de la Liberté d'Expression' (2014) 2014(13) D 787.

⁹⁹ Cass civ (2), 10 March 2004, Bull civ 2004, n°114; Cass civ (1), 11 February 2010, n°08-22111.

¹⁰⁰ See, e.g.: Jean Carbonnier, 'Le Silence et la Gloire' (1951) 1951 D 119.

¹⁰¹ Cass ass plén, 12 July 2000, Bull civ 2000, n°8; Bull inf C cass, 1 November 2000 concl M Joinet, rapp M Durieux; CCE 2000, comm 108, obs A Lepage; RTD civ 2000, 845, obs P Jourdain.

¹⁰² One leading interpretation of the role of art. 1382 of the Civil code is that it cannot be used to broaden the list of abuses of freedom of expression beyond the scope of the 1881 law; such abuses can only be repaired on the basis of one of the causes of action listed in the 1881 law. In

however, the basis for such exclusion changed. These cases considered that the article 1382 regime of civil responsibility was inapplicable to any (and all) cases involving abuses of freedom of expression against private individuals.¹⁰³ They did not refer to the law of 1881 and were therefore further restricting the scope of article 1382 beyond the scope of press wrongs. Although later cases alternatively relied on one justification or the other, the consensus was that in relation to press wrongs (including defamation), civil liability arising on the basis of article 1382 of the Civil code should be excluded.

A potential return of civil liability rules through the doctrine of abus de droit

A recent case of the *Cour de cassation* raises further difficulties, and suggests a potential return of civil liability rules, to the detriment of the law on the press. The claimants were appealing a Court of Appeal case approving a compensatory award based on article 1382 for the wrongful online diffusion of false information and rigged images. The claimants argued that abuses of freedom of expression can only be regulated on the basis of the law of 29 July 1881. Consequently, they contended that an award of damages on the basis of article 1382 of the Civil code breached this same article, as well as article 29 of the law of 29 July 1881 and article 10 of the European Convention on Human Rights (ECHR). The first civil chamber of the *Cour de cassation* quashed the appellate case on the sole basis of article 10 ECHR, implicitly dismissing article 29. Rejecting the appeal, it argued that abuses of freedom of expression are only characterised in specific instances laid down by the law, and that false statements did not fall within the scope of either article 1382 or article 29 of the law on the press.¹⁰⁴ Commenting on the case, Viney identifies a change in method. Contrary to past cases, the *Cour* uses the law of civil responsibility to limit the scope of

this context, disregarding the defendant's intention could theoretically have a substantial impact on the law insofar as it expanded the scope of what could be considered to constitute abuses of freedom of expression to the detriment of art. 1382. In practice, however, disregarding the defendant's intention had little impact. This is because although in most press wrongs the requisite intention, characterising *mens rea*, is a constituent element of the wrong, in the great majority of cases (including *diffamation* and *injures*) intention is presumed. See: Beignier *et al* (n 3), 1241.

¹⁰³ Cass civ (1), 27 September 2005, Bull civ 2005, I, n°346.

¹⁰⁴ Cass civ (1), 10 April 2013, D 2014, 131, note C Bigot, 508, obs E Dreyer; Gaz Pal 23 May 2013, 5; *Légipresse* 2013, 425, note N Verly.

freedom of expression; but in doing so it relinquishes the use of article 1382, preferring to rely on the doctrine of *abus de droit* (abuse of rights).¹⁰⁵ This concept has often been used in the context of abuses of freedom of expression, and in this case the *Cour de cassation* is using it despite the fact that the alleged misconduct falls within the scope of the law on the press.¹⁰⁶

The impact of this case on the pre-existing case law considering the respective scopes of article 1382 and of the 1881 law is uncertain.¹⁰⁷ The *Cour de cassation* is divided into chambers, including five civil ones¹⁰⁸ and one criminal. The case was delivered by the first civil chamber, and it is not clear that the other chambers will accept it. Further, a few months later the same chamber gave another judgment excluding the application of article 1382 in respect of a statement adversely affecting a person's reputation, on the basis of the 1881 law.¹⁰⁹ Viney, commenting on this case, notes that no reference was made to article 10 ECHR and the doctrine of *abus de droit*. While this judgment was not published – a sure sign of its lesser importance – it does question the significance and binding character of the earlier case. Viney also contrasts it with the first case on the basis of the legal sources grounding the claimant's action. Indeed, in the second case the claimants did not base their appeal on article 10 ECHR. They classically relied on article 1382 and the 1881 law. In her opinion, this suggests that the approach adopted in the first case will prevail in all cases in which article 10 ECHR is invoked, at the very least before the first civil chamber. If she is right, the issue is whether civil claims for abuses of the right to freedom of expression will be based on the 1881 law or on the doctrine of *abus de droit*. The respective scopes of civil and criminal liability rules in cases involving abuses of the right to freedom of expression (including defamation) have yet to be clearly defined.

¹⁰⁵ For an explanation of the emergence of the notion of *abus de droit* (and a somewhat dated summary of its application), see: Pierre Catala and John Anthony Weir, 'Delict and Torts: A Study in Parallel (pt. 2)' (1964) 38 Tul L Rev 221.

¹⁰⁶ Viney, 'La Sanction des Abus de la Liberté d'Expression' (n 98), IB2.

¹⁰⁷ For a detailed reflection on the effect of this judgement, see: Viney, 'La Sanction des Abus de la Liberté d'Expression' (n 98).

¹⁰⁸ This includes three strictly civil chambers, one commercial chamber and one *chambre sociale* dealing with labour law and national insurance disputes.

¹⁰⁹ Cass civ (1), 16 October 2013, n°12-21309.

III. Justifying tortious and criminal liability

The previous section noted that in the present day, the regulatory features in respect of defamation differ as between England and France. While the former chose a solely tortious approach, up until recently the latter preferred to rely exclusively on criminal law rules (although in light of one recent case mentioned above this issue has yet to be settled). This section analyses the reasoning that led to these regulatory outcomes, and considers the factors which have shaped the current laws of defamation in England and France.

Authors have paid due attention to this subject in England.¹¹⁰ However, French doctrinal writers have largely ignored this subject. They have confined their analysis to the legislative and case law developments, without considering their underlying justifications. This section summarises the work of the English writers and fills the gap existing in the French doctrine by engaging in a similar type of analysis in relation to the French law of defamation. Further, it builds on these analyses and compares the English and French regulatory features by reference to each system's method of structuring rules.

A. English law: crime as an instrument of repression

As mentioned previously, the criminal wrong of defamation established in the case *de libellis famosis* was sub-divided into two categories: public (or political) and private (or personal) libels.¹¹¹ This distinction had become well established by the mid-17th century, at the time when the Star Chamber was abolished. Private or personal libels were 'instituted by or on behalf of private persons in order to protect their personal reputation', while public or political libels were an instrument used 'by the state for political reasons'.¹¹² In this context, the criminal

¹¹⁰ See the works of J R Spencer, 'The Press and the Reform of Criminal Libel' in P R Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens 1978); Philip Harling, 'The Law of Libel and the Limits of Repression, 1790-1832' (2001) 44 JLH 107.

¹¹¹ See above, IIA1.

¹¹² Spencer (n 110), 266.

regulation of libel acquired a negative reputation for two main reasons. First, criminal prosecutions for public libel had an ‘overtly political’ character.¹¹³ Second, the development of the two parallel distinctions between libel and slander, and criminal and tortious defamation led to an inevitable understanding of the criminal offence of private libel as an instrument muzzling the press.

1. The arbitrariness of political libels

Political libels were characterised by an ‘arbitrary mode of initiating a prosecution’.¹¹⁴ Indeed, they began on the Attorney General’s *ex officio* information;¹¹⁵ this contrasted with the rules on criminal information for private libels, for which private individuals needed to apply for the discretionary leave of the court.

This had numerous negative consequences for defendants. A major procedural disadvantage was that they had limited access to the evidence relied on by the Crown.¹¹⁶ In practice, this meant that they would only discover the reasons for their prosecution in court, when the charges were read, and therefore had very little time to prepare their defence.¹¹⁷ Further, the process proved extremely costly for the defendants. They could be required to post securities for good behaviour before being admitted to bail, and could not recover the legal costs incurred, regardless of the outcome of the case.¹¹⁸ It is also clear that the jury was biased in favour of the prosecution. The procedure of selection of the jurors depended on their support of the Government; lacking such support jurors were stricken from the list before the beginning of the trial.¹¹⁹

As such, political libels effectively acted as an instrument of political censorship for the government. In the words of Harling: ‘there was an arbitrariness in the

¹¹³ *Working Paper No. 84, Criminal Libel* (n 15), 2.9.

¹¹⁴ J L J Edwards, *The Law Officers of the Crown* (Sweet & Maxwell 1964), 263.

¹¹⁵ *Ibid*, 262ff.

¹¹⁶ *Working Paper No. 84, Criminal Libel* (n 15), 2.9, specifically fn 29.

¹¹⁷ Harling (n 110), 113.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*, 116-17.

exemplary prosecutions under the law of libel that made it a formidable instrument of harassment, if ultimately not an efficient instrument of repression'.¹²⁰

2. Private libels and the stifling of freedom of expression: severe treatment of writings and prevalence of criminal actions against newspapers

A second factor leading to criminal defamation's disrepute is the fact that the criminalisation of the wrong became commonly associated with a muzzling of the press. There are two main causes for this. Written defamation was treated more severely than oral defamation, at a time when newspapers were the main source of writing. Further, libel claims against newspapers commonly chose the path of criminal, rather than civil, liability.

When the Star Chamber was abolished, its criminal jurisdiction was passed on to the common law courts. Consequently, it is before these courts that criminal proceedings had to be brought. Since the same courts administered the crime and the tort of libel, each doctrine influenced the development of the other. Thus, the common law courts introduced a rule (inherited from the Star Chamber) that libel, contrary to slander, would be actionable without proof of special damage. This rule facilitated actions for libels; written defamation was therefore treated more severely than oral defamation. Further, spoken defamatory words could never amount to a criminal offence. So the criminal regulation of defamation inevitably became associated with instances of written defamation. At a time when most writings emanated from press organs which did not necessarily share the government's views, the severe treatment of writings led to the view that libel acted as an instrument of censorship.¹²¹ In spite of the practical recognition of freedom of the press in 1679 when the Parliament allowed the Licensing Act 1662 to lapse, and no prior restraints on publication subsisted, libel was *de facto* allowing the government to exercise control over newspapers.

¹²⁰ Ibid, 111.

¹²¹ In this sense, see above, text to n 27.

Further, despite the fact that an action for libel could be tortious or criminal, claims against newspapers generally took the form of private libel prosecutions. This was for a variety of reasons. One major reason was the fact that political news and social gossip concerned primarily the aristocracy. The aristocrats generally opposed newspapers; they looked down on a civil action as they did not need the compensatory award; and overall preferred a criminal action which shared some characteristics with political libels, none the least its more public character.¹²²

These factors resulted in a growing dissatisfaction with criminal libel, which was widely seen as an instrument of repression. Legislative changes in the second half of the 19th century resulted in the gradual decline of criminal libel, until it was formally abolished in 2009.

B. French law: a rights-based philosophy of criminal law

In France, the advent of the Third Republic in 1870 brought about a significant movement of liberalisation for the press. Supervision was loosened, costs of entrance reduced and the left to the centre *Radicaux* lobbied to obtain less stringent press laws. Following the *Radicaux*'s victory in the 1876 elections, a press reform project was entrusted to a commission of twenty-two members.

1. The rejection of article 1382 of the Civil code as a basis for liability

The nature of the regulation was considered a preliminary issue by the commission; its main focus was to record and give content to the freedoms of expression and of the press.¹²³ Proclaimed in the 1789 Declaration of the Rights of Man and of the Citizen, they had had a troubled history over the course of the 19th century.¹²⁴ In order to realise them, the President of the commission

¹²² Spencer (n 110), 267-68; 273.

¹²³ Celliez and Le Senne (n 5), 3, 12.

¹²⁴ Indeed, after the enactment of the 1819 laws and until the first years of the Third Republic in the 1870s, short moments of freedom followed long periods of control of the press, albeit to differing degrees. Thus, freedom of expression was considered dangerous and rejected under the Consulate (1799-1804) and the Napoleonic Empire (1804-1814); it was controlled by different

suggested that the general principle of liberty to be proclaimed in article 1 of the law be limited by only two rules. The proposed limitations were the obligation to sign any written statement, and that of repairing any harm caused when exercising such freedoms on the basis of article 1382 of the Civil code.¹²⁵

However, the commission rejected this approach, which favoured a purely civil form of liability. It noted that *réparation*¹²⁶ of harm (legal redress) could be either civil or criminal in nature, mirroring the civil and criminal frameworks of liability.¹²⁷ Their purposes differed, focusing respectively on private interests and the public interest. Civil and criminal liability could coexist. Indeed, within the French system a victim can join criminal proceedings as a *partie civile* in order to claim compensation on the basis of article 1382 for the harm caused by the criminal offence.¹²⁸ Therefore, the existence of article 1382 of the Civil code did not preclude the enactment of a criminal law on the press.¹²⁹

It went on to assess, and ultimately assert, the necessity for a criminal law regulating press wrongs. Three factors were invoked to reject a system of purely civil responsibility. First, under a framework of civil liability, claims would be brought against individual authors. Their likely insolvency would in most cases result in an illusory framework of liability, *de facto* creating immunity from liability.¹³⁰ To the contrary, the 1881 law aimed at establishing a regime whereby the primary defendant was not the author, but rather the publisher or editor who were more likely to be solvent. Second, the fundamentally public character of press wrongs, threatening public peace, was considered incompatible with the

mechanisms – authorisation regime, preventive censorship, stamp regime – under the Bourbon Restoration (1814-1815 and then 1815-1830) and the July Monarchy (1830-1848). The short moments of freedom correspond to the ‘stuttering of democracy’: 1789-1792, 1795, 1815, 1819, 1828-1830, and to a certain extent 1868-1870. See: Gilles Lebreton, *Libertés publiques et droits de l’Homme* (8th edn, Dalloz-Sirey 2008), 464.

¹²⁵ Celliez and Le Senne (n 5), 4.

¹²⁶ ‘*Réparation*’ is the word used by the commission.

¹²⁷ Celliez and Le Senne (n 5), 5.

¹²⁸ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VB.

¹²⁹ Celliez and Le Senne (n 5), 4-5.

¹³⁰ *Ibid.*, 25.

private character of article 1382's civil reparation in the form of damage awards.¹³¹

Finally, establishing a system of civil liability for press wrongs was found to be contradictory with other, pre-existing provisions of the Criminal code due to the existence of a distinction between public and non-public statements.¹³² The *lois de Serres* only regulated statements characterised as public under article 1 of the law of 17 May 1819; non-public statements fell outside their scope and were regulated by the ordinary provisions of the 1810 Criminal code. The press reform project aimed at replacing all pre-existing laws regulating the press (including the 1819 laws). In that context, the implementation of a purely civil regulation *in lieu* of the previous laws would have created an illogical state of affairs. Following articles 222 to 224 of the 1810 Criminal code (which was left untouched by the press reform project), non-public statements would have generated criminal liability. Public statements, which were not regulated by that code, would have fallen within the scope of article 1382 and generated civil liability. So in practice, the law would have been more severe in relation to statements that did not meet the requirement of publicity. Despite the fact that they represented a lesser threat to public peace, they would have been treated as a criminal rather than a civil wrong. The law would even have treated oral statements more harshly than written ones if the former was public and the latter was not.¹³³

The commission therefore took the view that abuses of freedom of expression and of the press should generate criminal liability, which in the French system is compatible with a form of compensation awarded on the basis of the victim's *action civile*.¹³⁴

¹³¹ Ibid.

¹³² On this distinction, see Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IVA2a).

¹³³ Celliez and Le Senne (n 5), 25.

¹³⁴ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VB.

2. The protection of freedom of expression within the criminal law framework

In fact, the criminal regulation of defamation was an undisputed state of affairs. When the commission's *projet de loi* (Bill) reached the Senate, its opponents did not prescribe a complete abandonment of the criminal law. Rather, their proposed amendment recommended that press wrongs be regulated by a combination of article 1382 of the Civil code and article 60 of the Criminal code, which dealt with complicity.¹³⁵

This is probably because press wrongs (including defamation) had always been seen as a threat to public peace,¹³⁶ which the criminal law was designed to regulate. The commission noted that criminal law did not discriminate on the basis of the means through which the act was committed.¹³⁷ Now at the very roots of the creation of a regime specific to the press in the 1819 laws was the idea that wrongs committed through the press were not a specific category of wrongs. They were ordinary criminal wrongs; the press was merely a means of committing them.¹³⁸ As such, they called for a criminal regulation.

It is clear that, just as was the case in England, the instrumental use of the criminal law as a censorship tool was considered an issue. However, this did not lead to a genuine debate on the decriminalisation of press wrongs, including defamation. Rather, the reflection focused on whether press wrongs should be regulated under ordinary criminal law or under a special regime, derogatory to the general criminal law rules.¹³⁹ Although the importance of freedom of expression and of the press had long been recognised, it had never been fully or lastingly implemented. The law of 29 July 1881 sought to effectively establish it, marking a split with the years gone by since the French Revolution. In a context

¹³⁵ Celliez and Le Senne (n 5), xii.

¹³⁶ Ibid, 12.

¹³⁷ Ibid.

¹³⁸ Ibid, 10 citing the *Exposé des Motifs des Lois de Serres*.

¹³⁹ Ibid, 25.

in which the criminalisation of defamation was not questioned, it was felt that a derogatory regime would allow for a better protection of such freedoms.

This derogatory regime took the form of a unique procedural framework accounting for the specificities of press wrongs. One of its best-known procedural guarantees is the three-month limitation period established in article 65 (contrary to the ordinary prescription period for *délits* which is of three years).¹⁴⁰ Such short prescription period is justified on the basis that the impact of the wrong on the claimant's reputation or on the public order is often short-lived. As such, it would be unfair to allow a claim to be brought when the negative effects of a statement are no longer felt.¹⁴¹ It has important practical consequences on the evidential level, not the least that of acting as a liability limiting mechanism. With this in mind, three months is considered to be a reasonable period of time for which a person making a living out of his freedom of expression, such as a journalist, can be expected to be held accountable.¹⁴²

As a result of this process, the law of 29 July 1881 regulates press wrongs as criminal wrongs. They possess the ordinary criminal wrongs' basic definitional characteristics – they require a specific type of intention, involve societal harm, and their definition is sufficiently precise so as to not leave space for arbitrary decisions.¹⁴³ In fact, despite their regulation under a special law on the press rather than in the Criminal code, they are considered to be ordinary criminal wrongs.¹⁴⁴ However, they are characterised by a specific procedural framework that strives to guarantee freedom of expression and of the press.¹⁴⁵

¹⁴⁰ Art. 8 *alinéa* 1 of the Criminal procedure code.

¹⁴¹ Lécuyer (n 3), 242.

¹⁴² Ibid, 241. One of the main reasons for this is that it is felt that the defendant cannot be expected to preserve (or have access to) evidence for a longer period of time.

¹⁴³ Celliez and Le Senne (n 5), 181.

¹⁴⁴ Ibid, 181-82.

¹⁴⁵ Ibid, 25.

C. Path dependence in the English and French regulatory features

In the previous sub-sections I have respectively summarised and analysed the reasoning underlying the regulatory features in England and France, against the historical background of the development of defamation liability. In what follows, I build on the previous analysis to identify which factors have shaped the current law and more specifically the nature of the regulation.

1. Signs of similarity

The reasoning processes that preceded the regulatory outcomes in England and France diverge significantly. At different times in the 19th century, each system was pressured by a combination of historical and social factors to reconsider the nature of defamation liability. Both systems strove to protect fundamental freedoms (that of expression and, relatedly, that of the press); in doing so, one rejected the criminal framework while the other adopted and adapted it. Nevertheless, to quote from Weir who was comparing the English common law with the French doctrine of abuse of rights:

‘At first sight, then, at the level of labels, the systems are completely opposed; but when we look at the results, they are, with important exceptions, not so divergent.’¹⁴⁶

Indeed, the English and French laws of defamation share two fundamental characteristics. First, they have both brought the regulation of defamation within a framework of precise legal rules. In doing so, they rejected any general principle of liability, whether in the form of the tort of negligence¹⁴⁷ or in that of article 1382 of the Civil code. Second, owing to this framework, there is a direct correspondence in the way in which the wrong is positioned on national legal

¹⁴⁶ Catala and Weir (n 105), 237.

¹⁴⁷ Although negligence does protect reputation as a parasitic interest: see Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIIA1c).

maps. Each system is self-contained within a given area of law,¹⁴⁸ and each wrong presents peculiarities departing from ordinary English tort or French criminal law principles.

This is very clear in French law, where the ordinary criminal procedure is not applicable to press wrongs. Rather, as has been noted above, they benefit from a specific procedural framework.¹⁴⁹

It is less self-evident but still true in English law. In 2007, Justice Ipp gave a speech at the Judges' Review Conference in Sydney.¹⁵⁰ Reflecting on trends in the development of the law of torts over the preceding eighty years, he characterised defamation as 'the Galapagos Islands Division of the law of torts'.¹⁵¹ What he was affirming by drawing an analogy with a geographically isolated group of islands was, of course, the distinctive nature of the tort of defamation. The question that must then be asked is: what is the place of defamation in the framework of tortious liability? In this context, Justice Ipp's characterisation of defamation as a fully isolated tort is too extreme. Defamation is by no means an isolated tort. Nevertheless, it does possess unique features which distinguish it from other torts.

Defamation is not a fully isolated tort, because it shares some of the general characteristics of tortious wrongs, on the theoretical, structural and substantive levels. In the previous chapter, I referred to Stevens' rights-based account of tort law. According to it, there is a direct link between the existence of a specific tort and the protection of a given right. Indeed, most torts can be classified by reference to the right which they protect.¹⁵² This is also true of defamation

¹⁴⁸ Although this may become disputable in France in light of the judicial consequences of the judgement given by the *Cour de cassation* in April 2013 (n 104).

¹⁴⁹ See above, IIIB2.

¹⁵⁰ Although Justice David Ipp is Australian, his point applies to the common law in general.

¹⁵¹ Justice David Ipp, 'Themes in the Law of Torts' (speech delivered at the Judges' Review Conference, Sydney, 16 March 2007); Justice David Ipp, 'Themes in the Law of Torts' (2007) 81 ALJ 609, 615.

¹⁵² One major exception is the tort of negligence. Negligence is peculiar in that, contrary to other torts, it does not protect any specific right. Rather, it sets a standard of conduct, the breach of which generates liability. As such, it can theoretically protect a wide range of interests. There also exist other exceptions. One illustration is found in the tort of misfeasance in public office,

claims, which require the prior infringement of a person's right to reputation before a civil action can be brought. From a theoretical perspective, defamation is therefore as much a part of tort law as any other tortious cause of action.

With respect to sources of law, defamation is characterised by a high level of statutory intervention. Statutes have markedly influenced the development of the law of defamation. The landscape of defamation defences owes much to legislative intervention, which has both amended pre-existing defences and established new ones.¹⁵³ Further, statutes have engaged with definitional elements of the wrong. As such, it has been noted earlier in the thesis that section 1(1) of the Defamation Act 2013 has effectively amended the notion of defamatoriness by establishing a threshold of seriousness to defamation claims. However, legislative engagement is not peculiar to the tort of defamation. It is true that tort is commonly described as the archetype of common law methodology, with legal development being largely case-based.¹⁵⁴ But case law is by no means the only source of tort law. In a recent collection of essays considering the role of statutes in shaping tort law, Lee notes that the law of civil wrongs possesses three main sources: statute, the common law, and equity.¹⁵⁵ The editors of the collection argue that scant attention has been paid to the interaction of statutes and cases in shaping tort law. In their view, this neglect is at the source of an incomplete and misleading account of the law of tort.¹⁵⁶ Overall, the book – which predates the Defamation Act 2013 – acknowledges and illustrates the pivotal role of legislation in shaping diverse areas of tort

for which a wide range of distinct rights are alternatively used to ground a claim. See: John Murphy, 'Misfeasance in Public Office: a Tort Law Misfit?' (2012) 32 OJLS 51.

¹⁵³ This is examined in detail in James Goudkamp, 'Statutes and Tort Defences' in T T Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Pub 2013). He notes that a variety of legislative interventions have amended the pre-existing defences of innocent dissemination, truth, and honest opinion. Legislative intervention has also served to create new defences to the tort of defamation. The defences of publication on a matter of public interest and offer to make amends are examples of legislative creations that have been subject to later statutory amendments.

¹⁵⁴ In this sense, see: Paula Giliker, *The Europeanisation of English Tort Law* (Hart Pub 2014), 4.

¹⁵⁵ James Lee, 'A Civil Law for the Age of Statutes' in T T Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Pub 2013), 82.

¹⁵⁶ T T Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Pub 2013), specifically in Chapters 1 and 21.

law.¹⁵⁷ So while defamation is one of the areas in which statute law plays a significant role, this is not a distinguishing trait of the wrong. It is rather a factor of inclusion among other tortious wrongs. From a structural perspective, statutes shape defamation in the same way as they shape other torts.

It is uncontroversial to say that the law of defamation features legal forms and practices unknown in other parts of tort law. Some such practices – including jury trials and the extremely high quantum of damages – have recently been abandoned. Defamation law is no longer devoted to jury trials since section 11 of the Defamation Act 2013 abolished the presumption for jury trials, which now have to be specifically ordered by the court. Further, although damages are still higher than in other categories of cases, Mullis and Scott note a substantial reduction in the quantum of damages over the past twenty years.¹⁵⁸ However, other lasting characteristics of the wrong preserve its individuality within tort law. Thus, some of the practices in the law of defamation are infrequently encountered in other torts (as is the case for the taking into account of the defendant's motive)¹⁵⁹ or are peculiar to defamation (as is the case for instance in relation to the one year limitation period,¹⁶⁰ which seeks to preserve the competing right to freedom of expression, and in relation to the defences of truth, privilege and honest opinion). But these characteristics must not be over-exaggerated. In relation to the former, the emphasis should be on the word *infrequently*. Consideration of malice is in fact encountered in other torts, for instance in malicious falsehood of which, as its name indicates, it is a constituent element. In relation to the latter, defamation is not the only tort which features

¹⁵⁷ The individual essays consider the relation between statutes and the evolution of given torts (Chapters 3, 6 and 12), reflect on the development of key statutes (Chapters 7-10), and on the various actors who intervene in the process of legal change (Chapters 4 and 14). Of most interest are the introductory and the concluding Chapters, which draw together the analysis in the individual Chapters to explore the important (and typically neglected) role of statutes in shaping the law of tort.

¹⁵⁸ Alastair Mullis and Andrew Scott, 'Something Rotten in the State of English Libel Law?' (2009) 14 Comms L 173, 174.

¹⁵⁹ In this sense: *Crawford Adjusters & Ors v Sagcor General Insurance (Cayman) Ltd & Anor (Cayman Islands)* [2013] UKPC 17, [2013] 3 WLR 927, [133] (per Lord Sumption): 'Malice is as a general rule irrelevant to liability in tort.'

¹⁶⁰ S. 5 of the Defamation Act 1996 introduced ss. 4A and 32A of the Limitation Act 1980. Under s. 4A, the limitation period is of one year from the accrual of the cause of action, subject to the court's discretion (provided for in s. 32A) to disapply that limitation period.

specific limitation periods of defences. There are a number of other statutes that establish special periods of limitation for individual torts, including the Human Rights Act 1998 (HRA).¹⁶¹ A paramount example of the existence of individual defences is found in the torts of trespass to the person, which have a long list of trespass-specific defences.¹⁶² Finally, it is worth noting that since defamation is formally a tortious wrong, some of the general principles of tort law apply to it. Thus, there exist no independent rules of causation and remoteness applicable to defamation, and some of the general tort defences such as consent, release, *res judicata* and limitation may be relevant to a defamation claim.¹⁶³ From a substantive perspective, defamation therefore does not appear to be starkly distinguishable from other heads of tortious liability.

Adopting three different perspectives (theoretical, structural and substantive), I have argued that defamation cannot be described as being fully isolated from the other civil wrongs of the law of tort. Indeed, it protects a primary private right, shares the same sources of law as other civil wrongs, and the idea that its practices are unknown in other torts is only partly true. So, how is defamation nonetheless a distinctive tort? In light of the preceding analysis, an answer that would probably generate little disagreement is that defamation is distinctive because it is an extremely complex wrong, even in light of the common law methodology which does not tend to rely on general principles.

¹⁶¹ Under s. 7(5) of the HRA, proceedings for breach by a public authority of a person's Convention rights must be brought within one year from the date on which the act complained of took place or such longer period as the court considers equitable having regard to all the circumstances. Incidentally, it is interesting to note that the factors that the court must take into account under s. 32A when exercising its discretion to disapply the s. 4A limitation period correspond to ss. 33(3)(a), (b) and (e) of the Limitation Act 1980 in relation to personal injury claims. Note, however, that in *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240 Lord Bingham has cast doubt as to whether the HRA is a tort statute (at [19]).

¹⁶² Some such defences are: self-defence, preventing crime or a breach of the peace, lawful arrest, police powers of stop and search, clauses of anti-terrorism legislation, providing assistance to an officer of the law, confinement and treatment for mental disorder under the Mental Health Act 1983, instances of specific authority, detention of persons prior to deportation, powers to carry out strip searches.

¹⁶³ Richard Parkes *et al*, *Gatley on Libel and Slander* (Sweet & Maxwell 2013), 1.16 and 6.36 (on the absence of special rules of causation and remoteness in defamation cases), 10.2 and Chapter 19 (on general tort defences being applicable to defamation cases).

The complexity of defamation claims is widely recognised. In the Australian case of *Burrows v Knightley*,¹⁶⁴ Hunt J famously described defamation lawyers as ‘tripping one another upon precedents, groping knee-deep in technicalities [and making] mountains of costly nonsense’.¹⁶⁵ While this observation comes from Australia, it is equally applicable in England. In his own time, Diplock LJ was highly critical of the overtly technical character of English defamation law. In *Boston v Bagshaw*,¹⁶⁶ he commented that ‘the law of defamation... [has] become bogged down in ... a mass of technicalities’.¹⁶⁷ More recently, the complexity of defamation by comparison with other torts was recognised in the doctrine,¹⁶⁸ including in Gatley’s seminal work on defamation. The multitude of ‘categories’ in defamation was contrasted with the relatively few concepts of negligence (although it was recognised that some of them are difficult to define and apply).¹⁶⁹

Beyond the sheer number of technical requirements which must be addressed over the course of a defamation claim, a fundamental ground of distinction with other torts rests on the way in which some of these requirements are weighed. For instance, while malice is encountered in some other torts, it plays a much greater role in defamation. It is not a constituent element of the tort, but as will be seen in the next chapter it defeats numerous defences. These include honest opinion, qualified privilege, the website operators’ defence in section 5, and truth in the limited circumstances covered by section 8 of the Rehabilitation of Offenders Act.

Further, and perhaps more fundamentally, the role played by defences in defamation is incomparable to that which they play in other torts. The tort of defamation is notoriously broad, even with the new threshold of seriousness introduced by section 1(1) of the 2013 Act. The reason for this is that malice is

¹⁶⁴ (1987) 10 NSWLR 651.

¹⁶⁵ *Ibid*, 654.

¹⁶⁶ *Boston v WS Bagshaw & Sons* [1966] 2 All ER 906, [1966] 1 WLR 1126.

¹⁶⁷ *Ibid*, 1135.

¹⁶⁸ For instance, one author characterised the law of defamation as ‘a surfeit of technicality, complexity and the absurd’: Thomas Gibbons, ‘Defamation Reconsidered’ (1996) 16 OJLS 587, 587.

¹⁶⁹ Parkes *et al* (n 163), 1.16.

no longer a constituent element of the wrong. In the past, malice used to impose a high threshold for the imposition of civil liability in defamation cases, which acted as a barrier to liability.¹⁷⁰ In fact, the introduction of section 1(1) is an attempt to curb the number of defamation claims by rejecting trivial claims at the outset, since they might constitute an undue interference with freedom of expression.¹⁷¹ Defences therefore play a key role in limiting the imposition of liability, to the point that Descheemaeker argues that some of them are better interpreted as denials of a fault element rather than defences.¹⁷²

Overall, defamation is therefore not fully isolated from the rest of tort law and so is not accurately described as the Galapagos Islands. But it can perhaps be seen as the island of Corsica, closer to the mainland and nevertheless separate from it. It remains a self-contained wrong in the framework of tortious liability, just as the French wrong of defamation remains self-contained in the framework of criminal liability.

2. *A difference in method*

As a matter of fact, the divergence in the reasoning underlying the regulatory features owes much to each system's tradition of structuring legal rules. In rejecting the regulation of press wrongs under article 1382 of the Civil code, and preferring the criminal law framework, the French legislator was striving to accommodate the specific challenges and difficulties they raised. In order to treat each case on its facts, he was effectively departing from the traditional system of civil liability whereby press wrongs would have been treated as illustrations of a general principle of responsibility.

This method corresponds to the English tradition of structuring legal rules, which does not accommodate a similar *clausula generalis*; tort law has historically

¹⁷⁰ A more detailed analysis of the historical treatment of malice is developed in Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIIA.

¹⁷¹ *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946, [40].

¹⁷² Eric Descheemaeker, 'Tort Law Defences: A Defence of Conventionalism' (2014) 77 MLR 493, 511.

tended to define rights in precise terms. To some extent, the modern law of tort has departed from this traditional Blackstonian common law view of liability as a list of distinct nominate torts protecting specific rights. Indeed, the tort of negligence has abandoned tort law's fragmentary approach in favour of a fault-based standard of liability; consequently, it may protect a variety of legal interests. Nevertheless, it is submitted that while this may have had an impact upon the common law tradition by introducing a new approach to liability, it has come to complement rather than replace the previous one. Indeed, it is only in rare instances that the introduction of a tort of negligence has made other causes of action redundant. Rather, aspects of negligence have infiltrated individual torts.¹⁷³ Therefore, insofar as English tort law has become bifocal by recognising both a broad tort of negligence based on fault and individual torts protecting particular rights,¹⁷⁴ the definition of nominate torts in precise terms is still a characteristic feature of the common law tradition.

Further, one author's reasoning suggests that the regulatory features reflect different ideologies found in the English and the French legal systems. Mahoney, discussing the comparative economic growth of common and civil law countries, thus notes that:

‘Quite apart from the substance of legal rules, there is a sharp difference between the ideologies underlying common and civil law, with the latter notably more comfortable with a centralized and activist government.’¹⁷⁵

As compared to the English common law system, the French civilian system is better used to governmental intervention. Consequently, it is less opposed to a type of regulation involving the public system of criminal justice.

¹⁷³ Donal Nolan and John Davies, ‘Torts and Equitable Wrongs’ in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013), 17.09-17.13. For instance, Nolan and Davis argue that ‘nuisance, though not absorbed by negligence, overlaps with it, and is increasingly influenced by the idea of fault-based liability which underpins it’ (ibid). In fact, this reasoning is applicable in the law of defamation, which has integrated the paradigm of negligence in its defences. See Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIIA3.

¹⁷⁴ Nolan and Davies (n 173), 17.14.

¹⁷⁵ Paul G Mahoney, ‘The Common Law and Economic Growth: Hayek Might Be Right’ (2001) 30 JLS 503, 505.

So, although in both England and France the criminal regulation of speech had historically been used as an instrument of repression, the characteristics of each legal system have led them to address this issue in different ways. In England, criminal libel fell into disuse and was later abolished; in France the legislator created procedural safeguards within the criminal law system. In other words, the current state of affairs in which legal systems are opposed at the level of labels but not in their general approach to the wrong results from a difference in method.¹⁷⁶

3. An illustration of path dependence: the internal dynamic of the law

In that sense, the English and French regulatory features in respect of defamation owe a great deal to the mould of legal history and more importantly, legal culture. This reveals that they are symptomatic of path dependence. John Bell examined the importance of this concept for the comparative lawyer in a recent article, in which he defined it as follows:

‘[Path dependence] suggests that established legal approaches to the solution of issues will determine the way in which new situations or new problems are handled in the present and in the future. Legal development is explained ... by the internal dynamic of the law, the pressure of established ways of dealing with issues.’¹⁷⁷

The different regulatory features are the result of the internal characteristics of the common law and the civilian traditions in the way they structure legal rules. For this reason, their development in England and France is a telling illustration of path dependence in legal development.

¹⁷⁶ This endorses Weir’s conclusion: see Catala and Weir (n 105), 237.

¹⁷⁷ John Bell, ‘Path Dependence and Legal Development’ (2013) 87 Tul L Rev 787, 787-88.

IV. Assessing the impact of the English and French regulatory features on the structure and conceptualisation of the wrong

In the previous sections I have examined how England and France came to regulate defamation respectively in tort and in criminal law. In this section, I consider whether there exists a link between the nature of the regulation and the internal structures of the wrong of defamation in each jurisdiction. My argument is that no such link can be identified; however in analysing the structure of the wrongs I build on other existing doctrinal works to identify a common (and incorrect) focus on the means of committing the wrong.

A. The distinction between spoken and written words

Traditionally, the same rules applied to oral and written defamation in both England¹⁷⁸ and France.¹⁷⁹ However, contrary to its French counterpart, the English law of defamation has come to differentiate the treatment of libel and slander. So the question arises whether the presence of this distinction in English law can be rationalised on the basis of its tortious regulation of the wrong of defamation.

The reason for focusing on English law is that the traditional approach – the one that existed in both jurisdictions before they had any awareness of the nature of the regulation – was to recognise a single tort of defamation without distinguishing between oral and written defamation. But once England and France came to distinguish between tortious and criminal liability, only the former departed from the established principle. Since such a distinction between civil and criminal liability did not provoke any change to the French approach, there is little interest in studying it. It is rather more interesting to consider whether these distinct regulatory features influenced the English departure from the established principle.

¹⁷⁸ See above, IIA.

¹⁷⁹ See above, IIB1.

1. Denying the existence of a link between the libel/slander distinction and the regulatory features

The first case that appears to differentiate between spoken and written words is that of *King v Lake*, in 1667.¹⁸⁰ The facts of this case originate in the previous dispute of *Lake v King*.¹⁸¹ In the earlier case *Lake*, an official to the Bishop and Archdeacon of Lincoln, was claiming in defamation against King, a barrister. King had sent a petition to the House of Commons, in which he accused Lake and other parties of committing ‘high offences against His Majesty’s laws, Crown, and dignity’. Lake claimed that this statement had harmed his reputation, hindered the execution of his office and that he had incurred expenses while trying to prove his innocence. Lake’s claim failed on account of the statement being absolutely privileged. The court of King’s Bench extended the privilege applicable to judicial proceedings to parliamentary grievances. Once the petition was formally presented to the House of Commons, it became part of the proceedings of the house and provided King with immunity against civil liability.

In the later case, King was claiming against Lake in defamation on the basis of two separate statements: Lake’s written answer to King’s parliamentary petition, and his public utterance of words in the consistory court of Lincolnshire. The case report is very concise. On this occasion the Court of Exchequer did not consider the issue of privilege. It found for the claimant and Hale CB held that:

‘Although such general words spoken once, without writing or publishing them, would not be actionable; yet here they being writ and published, which contains more malice, than if they had but been once spoken, they are actionable’.¹⁸²

Seen as elaborating a distinction between spoken and written words, this decision was confirmed in the later cases of *Harman v Delany*¹⁸³ and (though reluctantly)

¹⁸⁰ See above, n 28.

¹⁸¹ *Lake v King* (1667) 85 ER 128, (1667) 1 Wms Saund 120.

¹⁸² See above, n 28.

¹⁸³ *Harman v Delany* Fitzgibbon 254.

in *Thorley v Kerry*.¹⁸⁴

The interpretation of *King v Lake* was a popular subject amongst 20th century doctrinal writers.¹⁸⁵ The idea that the regulatory features may have influenced the establishment of the distinction between libel and slander arises from the fact that the court was borrowing the criminal law formulation of libel in a civil context.¹⁸⁶ In fact, when the modern distinction between libel and slander was established in the 1769 case of *Villers v Monsley*,¹⁸⁷ the judges were arguably influenced by the principles applicable in the criminal law of defamation. Their ‘ridicule’ test¹⁸⁸ echoes the criminal law approach, which ‘punished anything which tended to take away a man’s reputation or make him the object of ridicule’.¹⁸⁹ Further, Mitchell suggests that Bathurst and Gould JJ’s references to punishment¹⁹⁰ are a direct indication that ‘both had drawn inspiration from the law of criminal libel’.¹⁹¹

However, there are two fundamental issues which indicate that no link can exist between the distinction between libel and slander and England’s regulatory features. The first is a chronological difficulty. While the judgement in *King v Lake* was given in 1667, it is only in the 19th and 20th centuries that awareness of the nature of liability led to a reflection around the content and value of the nature of the regulation of defamation. Second, and more importantly, the court in *King v Lake* was borrowing from criminal principles to apply them in a civil law context. It would therefore be illogical to assume that the English preference

¹⁸⁴ See above, n 29. On pieces confirming that the distinction is the same as that which was made 145 years earlier: Donnelly (n 6); Milsom (n 6).

¹⁸⁵ See, for instance: Joseph R Fisher, ‘A Chapter in the History of the Law of Libel’ (1894) 10 LQR 158; Frank Carr, ‘The English Law of Defamation, Part II’ (1902) 18 LQR 388; W S Holdsworth, ‘The English Law of Defamation’ (1902) 18 LQR 255; Van Vechten, ‘The History and Theory of the Law of Defamation. I’ (n 6); J M Kaye, ‘Libel and Slander - Two Torts or One?’ (1975) 91 LQR 524; David J Ibbetson, *A historical introduction to the law of obligations* (OUP 1999), 124.

¹⁸⁶ Mitchell (n 6), 29.

¹⁸⁷ *Villers v Monsley* (1769) 95 ER 886, (1769) 2 Wils KB 403.

¹⁸⁸ Ibid, 404: ‘anything which tends to make a man ridiculous or infamous ought to be punished’.

¹⁸⁹ Kaye (n 185), 530.

¹⁹⁰ *Villers* (n 187), 404.

¹⁹¹ Mitchell (n 6), 8.

for a civil regulation dictated the judges' decision to distinguish between libel and slander.

Mitchell has comprehensively reviewed the historical origins of the distinction.¹⁹² In his retrospective, he argues that the historical context of press censorship calls for a focus on Hale CB's reference to the words being written *and printed* rather than on the element of malice.¹⁹³ Such emphasis is justified by the fact that Hale CB was responding to the then well-established defence that words too vague or general would not be actionable. Indeed, Hale CB considered that this argument was not available when the words were written.¹⁹⁴ This is a convincing interpretation. It coheres with the late 17th century tendency to reject previously established rules limiting the availability of defamation actions, as was the case in relation to the rule against general words.¹⁹⁵

More importantly, Mitchell's interpretation coincides with the historical and societal background of the dispute between King and Lake. As was seen above, the late 17th century was marked by governmental censorship, as embodied in the Licensing Act 1662.¹⁹⁶ In this context, Mitchell argues that the existence of a distinct set of rules for spoken and written words (and consequently, of a mistaken focus on the means of committing the wrong) in English law flowed from the judicial concern to establish a strict regulation of speech. Indeed, its consequence was to introduce harsher rules for publishers than for mere speakers. In fact,

'[Such] judicial sympathy with press censorship can be seen from the fact that after the expiry of the Licensing act in 1679 common law judges were quick to recognise the criminal offence of seditious libel.'¹⁹⁷

¹⁹² Mitchell (n 6), Chapter 1.

¹⁹³ Ibid, 5-6.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ See above, IIIA.

¹⁹⁷ Mitchell (n 6), 6.

2. *An(other) illustration of path dependence*

In a legal system that adheres to the doctrine of *stare decisis* as is the case in England, a ‘seamless web’¹⁹⁸ of interconnections exists between the present law and the past. The role of history in shaping the current legal institutions is especially important. Mitchell stresses the random origin of the distinction and the role of precedent in maintaining it: ‘the court that formally ratified the distinction [in *Thorley v Kerry*] ... only did so because it felt that the authorities left it no choice.’¹⁹⁹ In other words, the court felt forced to rely on binding precedents despite the absence of a principled basis for such a distinction. And so, in the words of Holmes:

‘Somewhere in the past, ... in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it.’²⁰⁰

In that sense, although Mitchell does not use the expression of ‘path dependence’ he does give a good example of it in denying the existence of any principled basis for a solution that has persisted until the present day. As a result, it is impossible to link the difference in the internal structures of the English and the French wrong with each jurisdiction’s regulatory features.

B. Shared focus on the means of committing the wrong

Despite the absence of a distinction between libel and slander in France, it is interesting to note that the 1881 law does appear to recognise the existence of different means of committing the wrong. ‘*Loi sur la liberté de la presse*’ (law on the freedom of the press): the title seems to refer to a means of committing a wrong (through the press) and therefore to regulate wrongs committed through the media. This ambiguous label has led some authors to misinterpret it and to

¹⁹⁸ In the words of Weir, cited by Bell (n 177), 800.

¹⁹⁹ Mitchell (n 6), 29.

²⁰⁰ Oliver Wendell Holmes Jr, ‘The Path of the Law’ in Harold Joseph Laski (ed), *Collected Legal Papers* (Harcourt, Brace and Co 1920) 167, 186.

rationalise its application on the basis of the means of committing a wrong,²⁰¹ much in the same way as the English judges did in *King v Lake*.

Doctrinal works, however, point out that the shared characteristic of the wrongs regulated by the 1881 law is not the fact that they are committed through the media; it is the fact that they are ‘public’ for the purpose of article 23.²⁰² Lacking such publicity, none of the wrongs regulated by the law on the press are characterised.²⁰³ It just so happens that the publicity requirement is always characterised when the wrongs are committed through the media.

The goals of the law on the press and its predecessors support this view. At the inception of the laws of 1819, the framework of which was adopted by the law of 1881, was the idea that there exist no wrongs specific to the press. Rather, the press was used as an instrument permitting to commit some ‘ordinary’ wrongs.²⁰⁴ The goal of this set of laws was to regulate the wrongs committed through the press and to assimilate to it any other means of publication that would consequently fall within their scope. Thus, the law of 17 May 1819 amended the articles of the 1810 Criminal code regulating the predecessor of defamation, *calomnie*. This brought the wrong of defamation within the scope of the law on the press. It is clear, however, that defamation can be committed outside a media context. For instance, it will be characterised when a poster containing a defamatory statement is displayed in the entrance hall of a public location, such as a school or a town hall.²⁰⁵

²⁰¹ See for instance: Michèle-Laure Rassat, *Droit Pénal Spécial* (6th edn, Dalloz 2011), 546.

²⁰² See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IVA2a).

²⁰³ Lécuyer (n 3), 238. See the Garde des Sceaux (Justice Minister)’s statement before the enactment of the 1819 laws: ‘*des crimes et des délits commis avec publicité, et qui n’existent que par cette publicité même*’ (cited by Lécuyer at 242).

²⁰⁴ Celliez and Le Senne (n 5), 31; Gustave Le Poittevin, *Traité de la Presse*, vol 1 (Larose & Forcel 1901), 873. This aspect of the 1819 laws mirrored the regulation in the 1810 Criminal code. It is explained by the fact that at the time the 1810 Code was enacted, a *décret* (decree) of 5 February 1810 established a system of censorship whereby all the publications were subjected to a preliminary examination. Therefore, there was no reason to establish a specific framework for press wrongs in the Criminal code; such framework already existed outside the code. See: Claude Bellanger, *Histoire Générale de la Presse Française*, vol 2 (PUF 1969), 6.

²⁰⁵ Rassat (n 201), 577-78.

Beignier *et al* note that the law on the press was labelled as such at a time when the concept of ‘press’ referred not only newspapers (*la presse*), but also to printing machines (*une presse*). Coincidentally, in a misleading fashion, newspapers were the major mode of publishing when the law was enacted at the end of the 19th century. So most cases relying on the provisions of the 1881 law in fact involved newspaper entities (*la presse*). Nevertheless, the authors emphasise that it is indisputable that the law was designed to describe any public mode of expression, rather than the use of the media to commit a wrong. It must nowadays be understood as a medium for freedom of expression and of opinion.²⁰⁶

V. Conclusion

This chapter has considered the historical justifications offered for tortious or criminal liability in defamation in the English and French legal systems. Though there are divergences in labels, a comparison of the framework of liability highlights common structural features: a similar preference for precise rules to the detriment of general principles of liability, the creation of a self-contained system for defamation law, a shared (mistaken) focus on the means of committing the wrong. While path dependence has determined the different regulatory outcomes of each jurisdiction’s reasoning process, in many ways the English and French frameworks of defamation liability are very similar. Considering the significant differences between the English and the French legal systems, which are emblematic of the common law and civilian traditions, this similarity is interesting. It highlights how a similar result can be achieved through different means, adapting to ‘the style of legislation as well as its construction.’²⁰⁷

This argument will inform the rest of the thesis. By rejecting the idea that the structures of the English and French laws of defamation reveal fundamentally

²⁰⁶ See Beignier *et al* (n 3), 8. Beignier, Lamy and Dreyer highlight the fact that the law of 29 July 1881 is not applicable only to the media, but to any statement that has been published within the meaning of the law.

²⁰⁷ Catala and Weir (n 105), 237.

different approaches to the right to reputation, I submit that they are comparable *despite* their different regulatory features. In turn, this leaves open the possibility of finding substantive commonalities, and even – I argue – of uncovering a shared conceptual approach to defamation.

CHAPTER 3

THE ROLE OF FAULT IN THE ENGLISH AND FRENCH LAWS OF DEFAMATION: COMPARABLE STANDARDS AND SHARED APPROACH

I. Introduction

In the previous chapter, I argued that path dependence has determined the different regulatory outcomes in England and France. This suggests that the link between the nature of the regulation and the rules on defamation may not be as strong as it would have been had it resulted from a conscious and reasoned choice. The purpose is now to put this suggestion to the test.

The nature of the regulation (tortious or criminal) has the capacity to affect not only the structure of the wrong, as was the focus in the previous chapter, but also the substantive content of legal rules. In that context, the purpose of this chapter is to engage in a comparative analysis of the standards of liability (that is, of the role of fault) in the English and French laws of defamation. At first sight, these are grounded in the general rules regulating fault in tort and criminal law and so are irreconcilable. In England, defamation is typically described as a tort of strict liability; in other words, the defendant's fault is irrelevant to the imposition of liability. By contrast, in France a form of fault – intention – is necessary to impose liability. Contrary to this, the chapter argues that the nature of the regulation has had a limited influence on the standards of liability in the English and French laws of defamation. On closer analysis, the rules on fault are comparable in England and France, and in fact share the same conceptual approach.

First, I consider the official standards of liability in the English and French laws of defamation and their link with the nature of the regulation in each jurisdiction. Second, I assess adherence to the official standards of liability. I disprove the existence of any such link in practice, and argue that the standards of liability are in fact similar in the English and French laws on defamation. Finally, I

rationalise this finding on the basis of path dependence and justify the persistence of what I argue are no longer the most appropriate standards of liability on account of notions of embeddedness¹ and societal factors. Specific attention will be paid in this last section to the continued relevance, in both England and France, of the concern to promote media accountability which reveals a shared conceptual approach to the role of fault.

II. A direct correspondence between the regulatory features and the official standards of liability

The purpose of the chapter, as set out in the introduction, mandates the examination of two preliminary points. The inquiry focuses on the link between the English and French regulatory features and the standards of liability which they implement in their laws of defamation. I therefore start by outlining the official standards of liability. I then build on existing works considering the role of fault in tort and crime to demonstrate how the official standards of liability in the English and French laws of defamation relate to the general rules on fault in English tort and French criminal law.

A. The official standards of liability in the English and French laws of defamation

As a general rule, liability is imposed for wrongful acts. Descheemaeker notes that such wrongfulness may be characterised on the basis of elements of fault which concern the defendant's state of mind, or on the basis of other elements external to the defendant.² This chapter is exclusively concerned with the first set of factors – namely, those which relate to the defendant's fault. In what follows, I define the fault elements relevant to the law of defamation and consider how they fit in the English and French frameworks of liability.

¹ Bell's word. See: John Bell, 'Path Dependence and Legal Development' (2013) 87 Tul L Rev 787, 797.

² Eric Descheemaeker, 'Mapping Defamation Defences' (2015) 78 MLR 641.

There is no single definition of the notion of fault; it is commonly used as a general concept designating a range of mental states, from subjective to objective ones (including intention, knowledge, dishonesty, risk-taking, negligence). The difficulty lies in the fact that the precise definition of the given fault element depends on the relevant area of law (civil or criminal). In this sub-section, I outline the standards of liability relevant to the law of defamation, and their definitions in the context of tortious and criminal liability.

For the purposes of the law of defamation, there are at least two relevant standards of liability: intention and negligence.³ Broadly speaking, intention covers ‘everything which is part of one’s plan, whether as purpose or as way of effecting one’s purpose(s) – everything which is part of one’s reason for behaving as one does.’⁴ In tort, a requirement of intention may require that the defendant intend a consequence which is not an injury (injury being the normal focus in criminal law), or even that he only intend the act and not the consequence.⁵ On the other hand, negligence is generally described in both tort and crime as a behaviour creating unreasonable foreseeable risks of injury.⁶ It is predicated upon the wrongfulness of the defendant’s conduct, which is determined by reference to an objective standard. Failure to live up to that standard triggers liability, irrespective of the defendant’s motives (good or bad), of his habitual exercise of due care, or of external circumstances which would have similarly induced a lesser degree of care being exercised by the very person upon whom the objective standard is predicated.

In the English law of defamation, the *prima facie* cause of action consists in proving the publication of a defamatory statement which designates the claimant and has a tendency to harm his reputation, subject to any defences. Remarkably, this cause of action is exempt from any of the fault elements described above.

³ Recklessness, while officially relevant, is of little practical significance and is therefore not examined in this section. It is mentioned in passing below, in sections IIB and IIIA3.

⁴ John Finnis, ‘Intention in Tort Law’ in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1997), 229.

⁵ Matthew Dyson, ‘Tortious Apples and Criminal Oranges’ in Matthew Dyson (ed), *Comparing Tort and Crime* (CUP 2015), 440.

⁶ Richard W Wright, ‘Standards of Care’ in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1997), 251.

Thus, defamation is commonly described as a tort of strict liability, both in the case law⁷ and in doctrinal works.⁸ In other words, liability is imposed in the wrong of defamation without the claimant having to prove that the defendant was at fault.

The cause of action is broadly similar in French law. However, in the French wrong of defamation the imposition of liability requires proof of an additional element – the defendant’s intention.⁹ Thus, fault is officially required to ground liability in the French law of defamation.

B. The link between the official standards of liability and the rules on fault in tort and crime

At first sight, the standards of liability for defamation in England and France are aligned with each jurisdiction’s regulatory features. This apparent link is further reinforced by two parallel developments in the English and French laws of defamation.

In England, civil liability has historically been disconnected from considerations of fault. Under the writ system there was no need to plead the state of mind or culpability of the defendant and there existed no freestanding principle of liability for fault. Once the writs were abolished at the end of the 19th century, such a principle became embodied in the tort of negligence. Nevertheless, despite the importance that the wrong of negligence acquired, the nature of tort liability never became rationalised on the basis of fault. Rather, civil wrongs are

⁷ The strict liability doctrine is commonly understood to have its roots in the English case of *E Hulton & Co v Jones* [1910] AC 20, [1908-10] All ER Rep 29. It has been endorsed in other common law jurisdictions: e.g. in *Grant v Tortstar Corp* [2009] SCC 61; (2009) 3 SCR 640, the Supreme Court of Canada considered that the common law of defamation is ‘in effect a regime of strict liability’.

⁸ See, for instance: Robert Stevens, *Torts and Rights* (OUP 2007): ‘Although not traditionally classified as such, the “intentional torts” [including defamation] are torts of strict liability’; Richard Parkes *et al*, *Gatley on Libel and Slander* (Sweet & Maxwell 2013), 1.8.

⁹ Bernard Beignier *et al*, *Traité de Droit de la Presse et des Médias* (Litec 2009), 743.

commonly characterised as a breach of duty.¹⁰ Thus, there is no general requirement for civil liability to arise that the claimant be at fault.

Tort law can consequently ground liability for conduct that was not intentional, negligent, or sometimes even deliberate: these are instances of strict liability.¹¹ There exist various categories of strict liability. Defamation is generally understood to fall within the conduct-based category of strict liability, where liability attaches to the voluntary doing of an act: the publication of a statement. Thus, Cane's analysis of the wrong is that 'the basic rule ... is that a person can be liable for defamation even if they did not know and had no reason to suspect that they were publishing a defamatory statement or even that the defamed person existed.'¹²

The same solution cannot be adopted in respect of criminal law. The severity of criminal liability warrants the principle that all criminal offences should contain a fault element.¹³ Therefore, the general rule is that criminal liability only arises where both the *actus reus* and the *mens rea* elements are characterised.¹⁴ Glanville Williams considers that the *actus reus* 'includes not merely the whole objective situation that has to be proved by the prosecution, but also the absence of any ground of justification or excuse.'¹⁵ By contrast, the *mens rea* designates the relevant fault element.¹⁶ To each class of criminal wrongs corresponds a given mental element.

In France, criminal law rests on a tripartite classification of wrongs, based on their seriousness. *Crimes* are the most serious offences, *délits* are major offences

¹⁰ Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1995), 33, 37.

¹¹ Peter Cane, *The Anatomy of Tort Law* (Hart Pub 1997), 45.

¹² Ibid.

¹³ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VC. Contra: John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007), 227.

¹⁴ D C Ormerod, *Smith and Hogan's Criminal Law: Cases and Materials* (OUP 2009), 116. Note that French law does not commonly use the terms of *actus reus* and *mens rea*; rather, it refers to a 'material' and a 'mental' element.

¹⁵ Glanville Llewelyn Williams, *Criminal Law: the General Part* (2nd edn, Stevens 1961), 20.

¹⁶ Law Commission, *Report No. 177, Criminal Law: A Criminal Code for England and Wales* (1989).

and *contraventions* are minor ones.¹⁷ The principle laid out in article 121-3 of the Criminal code is that the most serious offences (all *crimes* and most *délits*) require intention. Other wrongs (including some *délits*) may be committed unintentionally. In these cases, the *mens rea* element is characterised by a lesser degree of fault: either *faute d'imprudence* (negligence, carelessness, recklessness) or *faute contraventionnelle* (which is characterised by the mere violation of a law or regulation, with no regard to the defendant's state of mind; to that extent it is questionable whether this warrants the label of fault at all).

In French criminal law, defamation is a *délit*, and is generally understood to be an intentional wrong, requiring both general and special intent. The former consists in the will or consciousness that the statement may adversely affect someone's reputation (*intention coupable*, or culpable intent), and the latter in the intention to publish the defamatory statement.¹⁸ This is not a contentious point. Since the approach is objective, doctrinal writers consider that the defendant is necessarily aware of the defamatory nature of the statement and consequently of its potential to cause harm.¹⁹

On the face of it, the fault requirements in the English and French wrongs of defamation are therefore aligned with those generally required in the context of tortious and criminal liability. This apparent correspondence is reinforced by two parallel developments in each English and French law.

In England, malice (understood as intention to injure) was historically a constituent element of both the tort of defamation and the criminal wrong of defamatory libel. Malice as a constituent element of the tort was abandoned in the early 20th century.²⁰ On the other hand, up until its abolition the characterisation of the crime of defamatory libel required proof of malice as the relevant *mens rea* element. In doing away with the requirement of malice, the tort of defamation distanced itself from its criminal counterpart. Thus, the link

¹⁷ Art. 111-1 of the Criminal code.

¹⁸ Beignier *et al* (n 9), 744.

¹⁹ Ibid, 745-48.

²⁰ See below, IIIA1.

between the tortious nature of liability and the English wrong of defamation was reinforced. The wrong is characterised by the intentional act of publication, rather than by the typically criminal notion of intending to bring about the harmful consequences of the act.

In France, the *Cour de cassation* declared that any *action civile* for defamation must be based on the 1881 law.²¹ This is a peculiar approach; the common practice is to ground these civil compensatory claims on article 1382 of the Civil code.²² The result is that France has rejected the use of the civil notion of fault in the context of press wrongs. In doing so, it has further entrenched the wrong of defamation in the realm of criminal liability.

These developments reinforce the link between the official standards of liability in the English and French laws of defamation and each jurisdiction's regulatory features. Overall, this suggests that the rules on fault in the English and French laws of defamation are dictated by the nature of the regulation found in each jurisdiction.

III. The standards of liability in practice: elements of similarity

Adherence to these official standards of liability, however, is not strict. The purpose of this section is to analyse the extent to which England and France depart from the official standards of liability in the law of defamation. As will be seen, at various points the English regime incorporates elements of fault; conversely, the French regime seems to be best rationalised on the basis of strict liability. Overall, the assessment carried out in this section disproves the existence of a link between the regulatory features and the standard of liability in each jurisdiction. To the contrary, the comparative analysis highlights the existence of comparable standards of liability.

²¹ Cass civ (2), 10 March 2004, Bull civ 2004, n°114; Cass civ (1), 11 February 2010, n°08-22111. See also Chapter 2: The framework of defamation liability in comparative historical perspective, IIB4.

²² Louis Boré, *JCl. Procédure Pénale*, Fasc. n°20, 9.

A. The questionable strictness of liability of the English tort of defamation

There exists a hierarchy of responsibility in the English law of defamation, with two categories of defendants. Primary defendants are those who intend to publish the defamatory statement; this category includes the author, editor and commercial publisher.²³ Their liability is commonly described as strict. By contrast, secondary defendants are those who did not create the defamation. Their actions vary from repetition or distribution to the omission to prevent publication, and their liability can only be engaged when the court is satisfied that it is not reasonably practicable for an action to be brought against one of those primarily responsible persons.²⁴ The liability of secondary defendants turns on a fault-based standard of liability: negligence. Section 1 of the 1996 Act allows them to escape liability if they can prove that they did not know and, having taken all reasonable care, had no reason to believe that their acts caused or contributed to the publication of a statement defamatory of the claimant.²⁵

In this section, I analyse the standard of liability applied to primary defendants. I start by outlining the gradual progression from a clear fault-based standard to one of strict liability. To a large extent, this historical retrospective focuses on the role of malice in the law of defamation and summarises Mitchell's work on this

²³ This category is defined *a contrario* in s. 1 of the Defamation Act 1996: 'In defamation proceedings a person has a defence if he shows that (a) he was not the author, editor or publisher of the statement complained of.'

²⁴ S. 10 of the Defamation Act 2013.

²⁵ The fact that s. 1(1) of the 1996 Act is formulated as a defence and that the burden of proof of reasonable care consequently rests on the defendant is noteworthy, but does not disrupt the overall argument. Indeed, s. 1(1) originates in common law rules developed in the 19th century (the first formulation being found in *Emmens v Pottle* (1885) 16 QBD 354, 50 JP 228), at a time when the framework of defamation liability was completely different to that which is in place today. Putting the onus of proof on the defendant was in line with the fact that this rule impacted the way in which the defendant was allowed to rebut the (then applicable) presumption of malice. Its preservation in the 1996 Act, and in the 1952 one before it, is a consequence of the fact that these statutes merely codified the common law rules without amending them. Parliament thus failed to recognise that the abandonment of the notion of malice within the modern framework of defamation liability would have logically required the burden of proof to be reserved (in this sense, see: *Goldsmiths v Sperrings Ltd* [1977] 2 All ER 566, [1977] 1 WLR 478, 487). For an in-depth reflection on the historical development of the rule, see: Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Pub 2005), Chapter 6.

issue.²⁶ In the following sub-sections I develop my own analysis, sometimes supported by the works of other authors, regarding what fault elements can be found in what is typically characterised as a strict liability regime.

1. From fault to strict liability in the tort of defamation

Up until the 19th century, the wrong of defamation had four constituent elements: (1) publication of (2) defamatory matter (3) referring to the claimant (4) with malice. Although there existed other elements of fault in the cause of action,²⁷ malice was the main source of fault in the law of defamation. From early in the history of the common law of defamation, the concept of malice was understood as ill will or the intent to injure the claimant; it was rebuttably presumed upon proof of publication of a defamatory statement.²⁸ So the type of intent covered by this requirement of malice corresponded to modern notions of criminal, rather than tortious liability. Indeed, it was clear that the defendant needed to intend an injury (although a presumption of intention arose upon proof that the defendant had uttered the defamatory words).²⁹

Subsequent developments blurred the status of malice by introducing a distinction between legal malice and malice in fact. Under the *Bromage* principle,³⁰ ordinary liability only required proof of legal malice, defined as ‘a wrongful act, done intentionally, without just cause or excuse.’³¹ Malice in law could be presumed: it was an objective standard. By contrast, cases involving the defence of qualified privilege required proof of actual malice, defined as ill will against a person.³² This involved the consideration of the defendant’s motive and

²⁶ Mitchell (n 25), Chapter 5. Another fundamental source is David J Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999), 115ff.

²⁷ Notably in relation to publication; this fault standard persists today as is noted below: see IIIA2.

²⁸ Mitchell (n 25), 102; Ibbetson (n 26), 115.

²⁹ Mitchell (n 25), 102.

³⁰ *Bromage v Prosser* (1824) 1 C & P 673, (1825) 4 B & C 24. On the development of the distinction between malice in law and malice in fact, see Paul Mitchell, ‘Malice in Defamation’ (1998) 114 LQR 639, who argues that the distinction is ‘based on the confusion of two separate principles’ (at 640-41): the fact that judges typically decided questions of law and juries questions of fact, and the content of the malice requirement in the law of defamation.

³¹ *Bromage v Prosser* (n 30), 254-55.

³² Ibid.

was therefore close to criminal concepts of malice. It was not presumed and needed to be proven by the claimant: it was a subjective standard. Mitchell notes that legal malice was still firmly rooted in ideas of fault, since the (rebuttable)³³ presumption³⁴ only arose upon proof that the defendant could foresee the harmful consequences of his actions.³⁵

The early 20th century case of *Jones* did away with the requirement of malice. The defendant publishers were sued for libel on the basis of an article describing fictional events involving an Artemus Jones. The question was whether an author could be liable for a statement involving a fictional character sharing some attributes (in this case, a name) with a defendant. The *Bromage* principles on malice supported previous *dicta* suggesting that no liability could arise in such circumstances. Nevertheless, the defendants' counsel failed to address this issue at first instance: he solely argued that since the person referred to in the article was fictional, the words could not be read as referring to the claimant. This was considered to be a question of fact for the jury to decide; and on the basis of the evidence, the jury found that they did refer to the claimant. The defendants were therefore found liable at first instance, any issue of malice being disregarded.

Mitchell rightly suggests that the abandoning of the requirement of malice in *Jones* is the result of a mistake. He notes that when the case got to the Court of Appeal, the defendants' counsel did address the issue of malice, but not its rebuttal. The appellate judges also failed to consider this issue, unconsciously departing from the (then applicable) *Bromage* principle. They alternatively suggested that malice was irrelevant to the establishment of a cause of action³⁶ or that it was automatically deduced in those situations where the ordinary meaning

³³ In this sense: *Day v Bream* (1837) 174 ER 212, (1837) 2 M & Rob 54, 56; *Harrison v Smith* (1869) 20 LT 713, 714-15; *Capital and Counties Bank Ltd v George Henty & Sons* 7 App Cas 741, 47 JP 214, 772.

³⁴ That malice could be established through a presumption is apparent from the cases of *Haire v Wilson* (1829) 109 ER 239, (1829) 9 B & C 643, 645; *Fisher v Clement* (1830) 109 ER 526, (1830) 10 B & C 472, 476. The presumption in fact arose in relation to all defamatory imputations, whether or not they were obviously defamatory: *Capital and Counties Bank Ltd* (n 33), 767, 772, 790.

³⁵ Mitchell (n 25), 109.

³⁶ *Jones v E Hulton & Co* [1909] 2 KB 444, 78 LJKB 937, 455 per Alverstone CJ: 'the intention or motive with which the words are used is immaterial, and ... if in fact the article does refer, or would be deemed by reasonable people to refer, to the claimant, the action can be maintained'.

of the words was defamatory.³⁷ By doing so, the court was more or less drastically relinquishing the requirement of malice. Ultimately, the House of Lords upheld the appellate judgement, and endorsed the more radical view that malice was irrelevant to the cause of action.³⁸ That this is a mistake based on an oversight is the only possible explanation, given that no such solution had previously been adopted or even considered in earlier cases. Yet, it was adopted and extended in the later case of *Newstead v London Express*.³⁹

Jones is generally recognised as being at the inception of the strict liability doctrine in defamation law.⁴⁰ Various factors have strengthened the interpretation of defamation as a strict liability tort. Two main such factors are the irrelevance of the defendant's due care in the cause of action and defamation's structural similarity with other no-fault torts such as trespass (where the defendant need only intend the act rather than its consequences for liability to arise). A third factor is the disappearance of other elements of subjective fault. The innocent publication defence, enacted in section 4 of the Defamation Act 1952, used to provide a defence to the defendant who was unaware that the claimant would be identified in the statement. Section 16 of the 1996 Act repealed this defence, thereby rejecting the fault criterion in relation to the issue of identification of the claimant. It should be noted, however, that section 2 of the Act introduced a new defence of offer of amends which could be used by a defendant who had innocently defamed the claimant.

2. A tortious standard of fault in the cause of action

Under the modern law of defamation, for the wrong to be actionable, the claimant must establish: (1) publication of (2) defamatory matter (3) referring to

³⁷ Ibid, 478 per Farwell LJ: 'the true intention of the writer of any document... is that which is apparent from the natural and ordinary interpretation of the written words; and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who know the claimant and the circumstances.'

³⁸ But note that the speeches of Lords Atkinson and Gorrell are ambiguous, endorsing both the views of Alverstone CJ and those of Farwell LJ: see Mitchell (n 25), 111.

³⁹ *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377, [1939] 4 All ER 319.

⁴⁰ See, for instance: Arno Reifenberg, 'Libel and Slander: Hidden Defamatory Meaning' (1947) 35 Cal L Rev 462, 462.

the claimant (4) likely to cause serious harm.

Fault plays a less important role in the cause of action than in the past. The repealing of section 4 of the Defamation Act 1952 by its 1996 successor has not only eliminated the existence of a fault standard in relation to the identification of the claimant, but also another one. Indeed, section 4 set a precondition to an offer of amends that the defendant had exercised ‘all reasonable care in relation to the publication of the statement’.⁴¹

The extent of the withering of the role of fault in the cause of action, however, must not be over-exaggerated. The argument that defamation is a tort of strict liability overlooks the existence of a long-standing fault standard in relation to publication. Indeed, the relevant question is whether the defendant intended, ‘knew or ought to have known, or might have expected’ that the matter would be published.⁴² As noted by Brown, ‘apart from *the possible exception of the issue of publication*, the innocence, good faith, motive, belief, reasonableness or intention of the defendant is generally irrelevant to the question of liability.’⁴³ This passage constitutes an indirect recognition that the listed factors may be (and the case law shows that they in fact are) relevant to the issue of publication. While this issue is not the main source of conflict in defamation claims, the negligence-like standard affirmed in *Huth v Huth* has been occasionally reaffirmed.⁴⁴

3. Tortious and criminal standards of fault in the defences

Fault elements are also found in the defences available to a defamation defendant. Before I engage into such analysis, I will explain why this is relevant to a section which discusses the strictness of defamation liability in England.

⁴¹ See s. 4(5) of the Defamation Act 1952: ‘... and in either case that the publisher exercised all reasonable care in relation to the publication’.

⁴² *Huth v Huth* [1915] 3 KB 32, [1914-15] All ER Rep 242, 38.

⁴³ Raymond E Brown, *The Law of Defamation in Canada* (Carswell Co 1987), 23-4 (emphasis added).

⁴⁴ See, for instance: *Theaker v Richardson* [1962] 1 All ER 229, [1962] 1 WLR 151.

One objection which may be raised in this context is that the presence of fault elements in the defences does not negate the strict liability nature of a wrong, since that fundamentally depends on the existence of fault elements in the cause of action. Indeed, if we endorse the view that defences are analytically separate from the tort,⁴⁵ the consequence is that a claimant escaping liability on the basis of a defence will nonetheless be held to have committed a tort. Under this view, any fault elements in the defences will be irrelevant to the characterisation of a tort as one of strict liability.

Contrary to this, there are two reasons why it is relevant to consider defences when assessing the role of fault in English defamation law. The first reason is theoretical. It is that the view outlined above is challenged. Descheemaeker doubts that defences are separate from torts, arguing that such an approach generates uncertainty in the determination of what can be categorised as a defence.⁴⁶ He illustrates his argument by reference to the defamation defence of truth, which he considers to be ‘a good test case because procedurally it can plausibly be placed on either side of the divide’: ‘it could either be for the defendant to prove truth or for the claimant to prove untruth’.⁴⁷ Analysing the influential definitions of defamatoriness found in the case law, he identifies conflicting statements. Some do not mention truth, implying that truth is a defence; others incorporate an element of falsity in the definition of defamatoriness.⁴⁸ The difficulty in determining what should count as a defence can be illustrated by reference to Goudkamp’s categorisation of defences in a book chapter published in 2011, where he referred to the existence of ‘absent element defences’.⁴⁹ Although in 2013 he rejected this view because it obscured

⁴⁵ See: James Goudkamp, *Tort Law Defences* (Hart Pub 2013), 5-7, who defines defences as ‘liability-defeating rules that are external to the elements of the claimant’s action’.

⁴⁶ See generally: Eric Descheemaeker, ‘Tort Law Defences: A Defence of Conventionalism’ (2014) 77 MLR 493.

⁴⁷ Ibid, 501. On the burden of proof in the context of the defence of truth, see below Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IVA1.

⁴⁸ Ibid, 502.

⁴⁹ James Goudkamp, ‘A Taxonomy of Tort Law Defences’ in Simone Degeling and James Edelman (eds), *Torts in Commercial Law* (Thomson Reuters 2011), 467.

the distinction between defences and denials,⁵⁰ this definition is noteworthy in that it evidences the link that exists between the constituent elements of a tort and its defences. Now if defences are not separate from a tort's constituent elements, or in other words if torts are understood to be committed *subject to* defences, then the elements of fault found in defamation defences warrant as much consideration as those found in the cause of action. This view, which I endorse, is in line with William's definition of an *actus reus* as comprising the whole objective situation and 'the absence of any ground of justification or excuse.'⁵¹ It is the reason why defamation is sometimes understood to impose liability for *false* statements.⁵²

Besides this theoretical argument, there is also a practical reason for which fault elements found in defamation defences must be examined in this chapter. It is that defences play a more important role in the law of defamation than they do in other areas of tort law. According to Descheemaeker, the reason for this is that since malice is no longer a definitional element of defamation, the scope of the wrong is extremely large.⁵³ The boundaries of liability are therefore primarily set by its defences. Thus, the substance of the tort cannot be grasped without considering its constituent elements along with its defences. While this is true, the relinquishing of malice is not the only element that makes defamation an extremely broad tort. From a comparative perspective, the broad scope of the English tort of defamation also owes to the definition of what counts as defamatory. It was noted in Chapter 1 that in France, defamatoriness does not solely depend on whether the statement harms the claimant's reputation. It also depends on the disputed statement's degree of precision.⁵⁴ This is a much more restrictive definition of defamatoriness than that which is in place in England. A

⁵⁰ Goudkamp, *Tort Law Defences* (n 45), 48.

⁵¹ Williams (n 15), 20.

⁵² See for instance *Youssouf v MGM Pictures Ltd* (1934) 50 TLR 581, 584, defining defamatoriness as 'a *false* statement about a man to his discredit'; Michael Jones *et al*, *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), 22-01: 'A person who communicates to a third party matter which is *untrue* and likely in the course of things substantially to damage the reputation of a third person is, on the face of it, guilty of a legal wrong for which the remedy is a claim in tort for defamation.'

⁵³ In this sense, see: Descheemaeker, 'Mapping Defamation Defences' (n 2), 669-70.

⁵⁴ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IVA.

logical consequence is that the role of defences is correspondingly more important in shaping defamation liability in English law.

A study of defences is therefore relevant for our purposes, and defamation defences in fact feature various fault elements. Interestingly, their analysis shows that while some adhere to the paradigmatic tortious standard of negligence, other forms of fault are closer to the criminal understanding of intention.

The most obvious example of a negligence-like standard of fault has traditionally been that of the now abolished '*Reynolds* privilege'.⁵⁵ Based on a duty/interest analysis, the availability of the defence depended on the existence of a public interest in the disclosure of the subject matter of the statement, and on the level of care taken by the defendant in the process of such disclosure.⁵⁶ A list of factors taken into account to assess this level of care⁵⁷ determined whether the author of the statement had met a standard of 'responsible journalism'.⁵⁸ This standard was comparatively similar to the negligence one. This is apparent in Lord Cooke's use of general negligence terminology ('reasonable care and skill in all the circumstances'),⁵⁹ as well as in his suggestion that general negligence standards may be relevant to the media.⁶⁰ The *Reynolds* privilege could reasonably be analysed as a subset of the negligence standard, applicable in the media context; and authors have noted the analogous character of both.⁶¹

With the enactment of the Defamation Act 2013, the *Reynolds* privilege has officially been abolished and replaced by a defence of publication on a matter of

⁵⁵ See: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, [1999] 4 All ER 609.

⁵⁶ *Ibid*, 177-78.

⁵⁷ *Ibid*, 205.

⁵⁸ *Ibid*, 202. The direct inspiration for this reasonableness standard is the High Court of Australia's case of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. For a consideration of the development of *Reynolds* and the influence of *Lange*, see Eric Descheemaeker, "A man must take care not to defame his neighbour": The Origins and Significance of the Reynolds Defence' (2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217139> accessed 22 September 2015.

⁵⁹ *Reynolds* (n 55), 224.

⁶⁰ *Ibid*.

⁶¹ See, for instance: Dario Milo, *Defamation and Freedom of Speech* (OUP 2008), 188ff; David Howarth, 'Libel: Its Purpose and Reform' (2011) 74 MLR 845, 868; Eric Descheemaeker, 'Three Errors in the Defamation Act 2013' (2015) 6 JETL 24, 35.

public interest.⁶² This change in wording appeared at a late stage in the legislative process, and its impact is unclear.⁶³ Descheemaeker, commenting on the new landscape introduced by the 2013 Act, thus notes that the wording of section 4 shifts the perspective from that of responsible (or reasonable) journalism to that of reasonable belief that the publication was, in fact, in the public interest.⁶⁴ He argues that the substitution of one standard for another, very different one, is the result of Parliament's eagerness to include in the new Act the relatively new defence of reportage. The clumsy interpretation of the defence emerging from the *Flood* case⁶⁵ (allowing the defendant to escape liability where he was reporting, in the public interest, statements made by a third party) thus led to the unfortunate blending of two different defences. The result is that the preservation of the objective standard of fault that the *Reynolds* defence had introduced will depend on the interpretation that is made of the new section 4 defence. Nevertheless, Mullis and Scott note that the plain intention of Parliament when passing the Act was that section 4 would involve the same analysis as that which developed under the *Reynolds* privilege.⁶⁶ When this issue goes to court, it is therefore likely that section 4 will preserve the negligence-like standard of the responsible journalism test.

Other defences are defeated upon proof of malice, which is an elusive concept. Fridman notes that the courts traditionally used it in the two senses outlined above,⁶⁷ distinguishing between malice in law (broadly corresponding to actual or constructive intention) and malice in fact (which designates ill will against a person, echoing criminal concepts of intention).⁶⁸ Indeed, the types of malice encountered in defamation defences differ.

⁶² Defamation Act 2013, s. 4.

⁶³ A good reflection on this change of wording is found in Descheemaeker, 'Three Errors in the Defamation Act 2013' (n 61), 33ff.

⁶⁴ Ibid, 37.

⁶⁵ *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273.

⁶⁶ Alastair Mullis and Andrew Scott, 'Tilting at the Windmills: the Defamation Act 2013' (2014) 77 MLR 87, 90.

⁶⁷ Above, IIIA1.

⁶⁸ GHL Fridman, 'Malice in the Law of Torts' (1958) 21 MLR 484, 487.

The first defence that is defeated upon proof of malice is that of honest opinion. However, in *Joseph v Spiller*,⁶⁹ the Supreme Court approved Lord Nicholls' reasoning in *Tse Wai Chun Paul v Albert Chen*⁷⁰ which defined malice as the defendant's absence of reasonable belief in the truth of the statement.⁷¹ In that sense, malice is far from either of its historical definitions.

Nevertheless, there are at least three defences – offer of amends, truth and qualified privilege – which still rely on a historical understanding of malice. The offer of amends procedure in sections 2-4 of the Defamation Act 1996 allows a defendant to admit his wrong, offer a correction and/or apology and pay the complainant an agreed sum of money.⁷² It is only if the claimant refuses the defendant's offer of amends that the defendant can escape liability, unless he knew or had reason to believe that the words complained of (1) referred to the claimant or were likely to be understood as referring to him, and (2) were both false and defamatory of him.⁷³ In other words, the defendant will be immune from liability unless the claimant can prove that he maliciously published the defamatory statement. In this context, Eady J described the circumstances in which malice would be characterised as follows: '[the defendant] has chosen to ignore or shut his mind to information which should have led him to believe, not merely suspect, that the allegation is false.'⁷⁴ This echoes the historical definition

⁶⁹ *Joseph v Spiller* [2010] UKSC 53, [2011] 1 All ER 947.

⁷⁰ *Tse Wai Chun Paul v Albert Chen* [2001] EMLR 777, at [41] per Lord Nicholls (in the Hong Kong Court of Final Appeal): 'The purpose for which the defence of fair comment exists is to facilitate freedom of expression by commenting on matters of public interest. ... And it is in the public interest that everyone should be free to express his own, *honestly held* views on such matters' (emphasis added). Also in this sense: See: F A Trindade, 'Malice and the Defence of Fair Comment' (2001) 117 LQR 169. Interestingly, if the responsible journalism standard of *Reynolds* did shift to that of reasonable belief, malice may become relevant in the context of s. 4 in the same way as it is in the defence of honest opinion. This would amount to a rediscovery of malice: indeed, it was relevant in the past since the *Reynolds* privilege was rooted in the defence of qualified privilege, but had become irrelevant. See *Parkes et al* (n 8), 15.21.

⁷¹ *Ibid*, [67]: 'Lord Nicholls broke new ground in holding that malice in the context of fair comment had a different meaning from malice in the context of qualified privilege. In the former context, the motive for making the comment was irrelevant. All that mattered was whether or not the commentator honestly believed in the truth of his comment.'

⁷² So, while it is classified as a defence, it also acts as a dispute settling mechanism. In this sense: Descheemaeker, 'Mapping Defamation Defences' (n 2), 667-68.

⁷³ S. 4(3) of the Defamation Act 1996.

⁷⁴ *Milne v Express Newspapers Ltd* [2002] EWHC 2564, [2003] 1 All ER 482, [41], as endorsed and clarified by Lord Justice May in the Court of Appeal (*Milne v Express Newspapers plc* [2005] 1 All ER 1021, [2005] 1 WLR 772, [35]-[36]).

of malice in law: ‘a wrongful act, done intentionally, without just cause or excuse.’⁷⁵

Reliance on the historical understanding of malice as ill will is even more apparent in the defences of truth and qualified privilege. In these situations, malice acts as a defence to a defence (which Descheemaeker labels ‘*replicationes*’):⁷⁶ where proven by the claimant, it prevents the defendant from relying on the relevant defence. According to section 8 of the Rehabilitation of Offenders Act 1974, the truth defence is unavailable to malicious disclosures of spent convictions.⁷⁷ In *Horrocks v Lowe*,⁷⁸ Lord Diplock noted that in this context, lack of belief in the truthful character is not enough to characterise malice. Rather, what is needed is for ‘the desire to injure [to] be the dominant motive for the defamatory publication’.⁷⁹ Likewise, the availability of the defence of qualified privilege is conditioned by the defendant’s motive in making the statement.⁸⁰ In *Loutchansky*, Lord Phillips defined malice as ‘consist[ing] either of recklessness, i.e. not believing the statement to be true or being indifferent as to its truth, or of making it with the dominant motive of injuring the claimant.’⁸¹

In the latter two defences (truth and qualified privilege), echoing criminal notions of intention, the understanding of malice clearly designates the intent to injure the claimant. In other words, the definition is grounded in the defendant’s intention in relation to a particular outcome. This notion, which is primarily

⁷⁵ See above, text to n 31.

⁷⁶ Descheemaeker, ‘Mapping Defamation Defences’ (n 2), 644.

⁷⁷ See further Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IVB.

⁷⁸ *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662.

⁷⁹ *Ibid*, 149.

⁸⁰ This can sometimes lead to an overlap between actions in defamation and in negligence. Where a claim in defamation returns a finding of no liability unless the defendant was malicious (as is the case where the defence of qualified privilege is validly raised), and the defendant was not motivated by malice but was merely negligent, the tort of negligence can successfully be used to bring a claim for compensation in relation to the secondary interests protected by the tort of defamation (e.g. economic interests). See for instance *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129. A useful analysis of the conflict between the two torts is found in Eric Descheemaeker, ‘Protecting Reputation: Defamation and Negligence’ (2009) 29 OJLS 603, 634ff.

⁸¹ *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2002] 1 All ER 652, [33].

encountered in criminal law,⁸² corresponds to the law of defamation's historic requirement of malice in fact. But the role ascribed to malice has changed, and this is reflected in the stage of the claim at which the issue arises. Whereas initially malice was a constituent element of the cause of action, it is now relevant to various defences.

B. Negligence and strict liability in the French criminal wrong of defamation

It has been argued that fault elements are found in the officially strict liability regime of English defamation law. Likewise, elements of strict liability are found in the officially fault-based regime of French defamation law. This is a subject that has been given little (if any) attention by French doctrinal writers. The strict liability standard applied to publishers is commonly recognised,⁸³ but is typically not questioned. In the rare cases in which it is questioned, the inquiry is extremely superficial.⁸⁴

The argument in this section is that there are at least two senses in which the French law of defamation departs from the general defamation law requirement that fault in the form of intention be proven, in relation to three categories of defendants, which correspond to those studied in the previous section:⁸⁵ authors, and so called *directeurs de publication* (commercial publishers)⁸⁶ and editors. In turn, this is a departure from the general criminal rule that *délits* require intention

⁸² Above IIA.

⁸³ See, for instance: Beignier *et al* (n 9), 1116.

⁸⁴ See, for instance, considering the issue in three terse paragraphs: Bertrand de Lamy, 'Le droit pénal de la presse à l'épreuve des principes du droit pénal et de la responsabilité pénale' (2013) 2013(9) *Dr pén* repère 8.

⁸⁵ The responsibility of other defendants (printers, vendors, distributors) is of little comparative interest. It is raised on such an infrequent basis that Dreyer has described it as a last resort measure (Emmanuel Dreyer, *Responsabilités Civile et Pénale des Médias: Presse, Télévision, Internet* (3rd edn, LexisNexis, Litec 2011), 799).

⁸⁶ The *directeur de publication* corresponds to the notion of 'publisher' in the commercial sense in which it is used for the purpose of the defence of s. 1 of the Defamation Act 1996. It therefore designates 'a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business' (s. 1(2) of the Defamation Act 1996). This must be contrasted with the common law notion of 'publisher', which designates any defendant who has communicated the defamatory matter to others (Parkes *et al* (n 8), 6.12).

as the fault element and that mere negligence (and by extension, the absence of fault) are normally insufficient to ground liability.

1. The author: a presumption of intention and no mens rea negating defence

Intention coupable is officially a constituent element of the wrong of defamation. It characterises one part of the defendant's *mens rea* (the second being intent to publish). However, *intention coupable* need not be proven: it is presumed upon proof of publication of the material. Surprisingly for a country that follows a tradition of codification, there is no written basis for this presumption, which was first affirmed by the *Cour de cassation* in 1894.⁸⁷ It is crucial to appreciate the nature of this presumption in order to assess the actual role of fault in the French law of defamation.

The presumption can be analysed in one of two ways. It can be interpreted as the (unofficial) abandonment of intention as a constituent element of the wrong, or as a mechanism of indirect proof in order to facilitate the bringing of a claim. It is the indirect proof analysis that is the official interpretation: theoretically, the presumption can be rebutted.⁸⁸ Consequently, while it has been challenged both on conventional and on constitutional grounds, it has never been struck down insofar as it complies with the criminal rules on fault.⁸⁹

⁸⁷ Cass crim, 23 August 1894, D 1895-I-191. Contemporary writers are inclined to ground it on art. 35 *bis* as amended by the ordinance of 6 May 1944, but Beignier criticises this view. See: Bernard Beignier, *L'Honneur et le Droit* (LGDJ 1995), 161.

⁸⁸ Emmanuel Dreyer, *JCl. Pénal Code*, Fasc. n°80, 54.

⁸⁹ The *Cour de cassation* considers it compatible with arts. 6 and 10 of the European Convention on Human Rights since the presumption is rebuttable (Cass crim, 16 March 1993, Bull crim 1993, n°115). These arguments have also justified a refusal to refer the question of its constitutionality to the *Conseil constitutionnel* (Cass crim, 13 March 2012, n°11-90123). Such a refusal is well established, though its justification changes. The *Cour de cassation* has argued that the question does not relate to the constitutional validity of the rule, but rather concerns the interpretation that has been made of it (Cass crim, 31 May 2010, n°09-87578). Further, it was pointed out that the question does not meet the threshold of 'seriousness' required for it to be presented to the *Conseil constitutionnel* since the presumption is rebuttable and therefore does not go against the principles of a fair trial (Cass crim, 21 June 2011, n°11-90046).

Nevertheless, in practice two factors suggest that rebutting the presumption is not straightforward. The first is that the issue is raised on a very infrequent basis; in fact judges are not even bound to refer to it in their judgement.⁹⁰ The second is that the official way to rebut the presumption is by raising the defence of *bonne foi* (good faith). However, the defence of *bonne foi* only allows for an indirect rebuttal of the presumption. Indeed, it does not require that intention be disproved, but rather sets an objective negligence standard-like defence.⁹¹ This defence is available where the defendant can prove: (1) the existence of a legitimate goal, (2) the existence of prior research, (3) the absence of hostility towards the claimant, and (4) caution in the wording of the statement.⁹² What is striking in this definition is that proving the absence of *mens rea* alone does not defeat the presumption. Accordingly, the standard of liability in respect of the author of the statement may be described as aggravated. This is a first element distancing the law of defamation from the general principles of French criminal law and nuancing the link between the standards of liability and the French regulatory features. Nevertheless, although the author's standard of liability departs from the general principles of French criminal law, it does not draw on civil law principles.

2. *The publisher: an impossible rationalisation of (strict) liability*

More interesting is the analysis of the role of fault in relation to the publisher's liability (publisher being understood in the commercial sense throughout the section), where it appears that criminal notions of fault have been abandoned in favour of tortious ones. This reasoning can be extended to the editor, whose liability is established on the basis of the same rules as those applicable to publishers.⁹³

⁹⁰ Roger Merle and André Vitu, *Traité de Droit Criminel*, vol 1 (7th edn, Cujas 1997), 88.

⁹¹ The correspondence with negligence is apparent from Beignier's interpretation of *bonne foi* as *honnêteté intellectuelle* (intellectual honesty), which echoes the *Reynolds* 'responsible journalism' standard: see Beignier (n 87), 162.

⁹² These requirements were formulated in a doctrinal article (Pierre Mimin, (1939) 1939.I Dr pén 77), and were subsequently applied and systematised by the courts.

⁹³ Indeed, according to art. 42 of the law of 29 July 1881, it is the liability of publishers (in the commercial sense) and editors which is engaged in the first place. This will be explored further in the following paragraphs.

The highly subjective nature of criminal law justifies the rule of article 121-1 of the Criminal code, according to which ‘no one is criminally liable except for their own conduct’. On the basis of this rule, the primary defendant should logically be the author of the defamatory statement. However, contrary to this, article 42 of the 1881 establishes a system of *responsabilité en cascade* (literally: cascading responsibility). This means that there is a hierarchical order in which one’s liability will be engaged as the principal author of the offence: (1) the (commercial) publisher or editor, (2) the author, (3) the printer, (4) the vendor or distributor.⁹⁴ According to article 43, the author is treated as an accomplice. There are various ways in which this rule can be rationalised on the basis of general criminal law principles. However, none of these explicative theories is fully satisfactory. This ultimately suggests that the publisher’s liability can only be strict, and consequently that the law of defamation relies on an understanding of the role of fault that is closer to tortious than to criminal principles.

a) Liability based on the author’s statement

At first sight, article 42 appears to attribute liability for the disputed statement to the commercial publisher, rather than the natural perpetrator of the criminal wrong – the author. So the publisher’s wrong is directly attached to, and dependent on, the author’s. His responsibility could therefore be rationalised on the basis of principles of vicarious or accessory liability.

Vicarious liability

While in theory the rule of article 121-1 of the Criminal code precludes the existence of vicarious liability in criminal law, there exist exceptions to this principle. The most important is the liability of the *chef d’entreprise* (head of the

⁹⁴ This a rule whose mechanism mirrors that introduced by ss. 1 of the Defamation Act 1996 and 10 of the Defamation Act 2013, except that the hierarchy of responsibilities differs.

undertaking), who is liable for a wrong committed by a third party on the basis of his own (presumed) negligence in preventing the wrong from being committed.⁹⁵

However, this interpretation is problematic in that the law of defamation does not fully conform to the principles of criminal vicarious liability. In order to counterbalance the severity of the presumption of the *chef d'entreprise's* negligence, French criminal law allows him to escape liability where he can prove that he had delegated control or power to another person.⁹⁶ This delegation is characterised where it is proven that the surveillance of part or all of the material or technical process has been entrusted to a third party.⁹⁷ This possibility, however, is absent for publishers under the 1881 law. They are liable for the wrong of defamation although they may not have been aware of the article's insertion in the newspaper, or even been in a position to read it or to oppose its publication.⁹⁸

Accessory liability

More promising is the theory of accessory liability. Prior to the law of 1881, the author was primarily liable for the wrong of defamation, with printers being subject to the rules of accessory liability.⁹⁹ This theory was therefore discussed at length in the run up to the enactment of the law of 1881.¹⁰⁰ However, it cannot explain the publisher's primary liability under the current law of defamation. Accessory liability as defined in article 121-7 of the Criminal code requires (1) an illegal primary wrong (a crime or *délit*), (2) a positive act of participation and (3) the necessary mental element: the positive act of assistance in the commission of a criminal wrong must be done knowingly. Now it is clear that in various instances of defamation, the required *mens rea* element will be absent. In

⁹⁵ Bernard Bouloc, *Droit Pénal Général* (22nd edn, Dalloz 2011), 383.

⁹⁶ Ibid, 385; Cass crim, 11 March 1983, Bull crim n°112.

⁹⁷ Bouloc (n 95), 385.

⁹⁸ Cass crim, 29 November 1860, DP 1861.1.45; Cass crim, 7 November 1884, DP 1886.1.142; Cass crim, 9 February 1950, D 1950, 230. Contra, see the isolated case mentioned below, n 153.

⁹⁹ Art. 24 of the law of 17 May 1819.

¹⁰⁰ Countless references to accessory liability are found in the preparatory works to the law of 29 July 1881: see Henry Celliez and Charles Le Senne, *Loi de 1881 sur la Presse, Accompagnée des Travaux de Rédaction* (Marescq Aîné 1882).

cases where the publisher did not read the article or was not aware of its insertion in the newspaper, the mental element necessary to characterise accessory liability will be lacking. So the rules relating to the publisher's liability do not comply with the general principles of accessory liability.

b) Liability based on the publisher's conduct

A second possible interpretation is that the publisher's liability is not grounded in the author's act, but rather in another wrong, which is conceptually separate from that of the author but receives the same legal classification. This wrong may be characterised by the publisher's failure to fulfil his official duties; this would imply a lower level fault, mere negligence being sufficient to characterise *mens rea*. Alternatively, the wrong may be characterised by the publisher's act of publication analysed as a consequential wrong.

Negligent failure to fulfil official duties

The publisher's responsibility may be interpreted as being functional and based on his negligent failure to comply with his official duties of control over the content of the publication. This lower level of fault corresponds to one of the official exceptions to the requirements that liability for *délits* requires intent on the defendant's part:¹⁰¹ it is a *faute non intentionnelle* (fault of carelessness or negligence), grounded in article 121-3 *alinéa* 3 of the Criminal code. Following this analysis, the *actus reus* is the publisher's act of publication; and the *mens rea* is the publisher's negligence in the performance of his duties of control.

The first difficulty with this explicative theory is that there is a discrepancy between the elements of the wrong and its classification. The characterisation of defamation requires proof of general and special intent; if the publisher's wrong is unintentional, it is illogical to ground liability in the law of defamation.

¹⁰¹ Art. 121-3 *alinéa* 1 of the Criminal Code.

More importantly, this interpretation cannot be reconciled with the accepted definition of *faute non intentionnelle*. According to article 121-3, *alinéa* 3 of the Criminal code,

Il y a également délit, lorsque la loi le prévoit, en cas de faute d'imprudence, de négligence ou de manquement à une obligation de prudence ou de sécurité prévue par la loi ou le règlement, s'il est établi que l'auteur des faits n'a pas accompli les diligences normales compte tenu, le cas échéant, de la nature de ses missions ou de ses fonctions, de ses compétences ainsi que du pouvoir et des moyens dont il disposait. A délit also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him.¹⁰²

The wording of the provision suggests that the publisher can only be liable when he has been proven not to have acted with due care.¹⁰³ But contrary to this rule, under the law of defamation the publisher is automatically liable upon publication: due care thus becomes irrelevant because his liability is automatic.¹⁰⁴ This fault-based interpretation of the publisher's liability is therefore not sustainable.

¹⁰² Emphasis added.

¹⁰³ This analysis is further supported by looking at how the wording of the provision was modified. Bouloc thus highlights different stages during which the formulation varied. The original provision did not refer to any standard of due care: it only provided that '*lorsque la loi le prévoit, il y a délit en cas d'imprudence, de négligence ou de mise en danger délibérée de la personne d'autrui*.' In 1996, the law added a *caveat* to this rule, which allowed the wrongdoer to escape liability where he could be proven to have acted diligently ('*sauf si*'). Finally, in 2000, there was a shift in the reasoning: it is not that the wrongdoer can escape liability where he acted diligently, but rather that he is not at fault unless he is proven not to have acted diligently ('*s'il est établi que*'). See: Bouloc (n 95), 290-91.

¹⁰⁴ See above, text to n 98; Bouloc (n 95), 385.

Infraction de conséquence

Dreyer has suggested another interpretation, which recognises publication as an independent wrong committed by the publisher, but highlights its link with the wrong committed by the author.¹⁰⁵ He suggests that the publisher's liability under article 29 may be an *infraction de conséquence* (a consequential wrong). This theory distinguishes between two separate criminal wrongs, the first being a necessary prerequisite for the second. Under this interpretation of defamation, the author's statement characterises the necessary preliminary wrong; and the publisher's publication of that statement constitutes the consequential wrong. This theory relies on a specific understanding of the publication process. Specifically, it argues that it is the publisher rather than the author who commits the act of publication for the purposes of article 23. In Dreyer's opinion, the author's statement is better characterised as an instance of non-public defamation, which falls short of the requirement of publicity in article 23 and therefore falls within the scope of articles R621-1-R621-4 of the Criminal code.¹⁰⁶ This is an attractive theory, because it is based on an accurate description of the situation, in which the *actus reus* is the publisher's act of publication and the *mens rea* is his intent to publish.

However, there are various issues with this explicative theory. Dreyer acknowledges and responds to two of them. The first is the requirement that there exist a preliminary criminal wrong. Unlike defamation and *injures*, not all press wrongs possess a corresponding offence in the Criminal code for the instances in which the publicity requirement of the 1881 law is not met. For those wrongs, it is impossible to characterise the required preliminary criminal wrong. Dreyer counters this criticism by noting that there exist exceptions to this requirement, and that there is no reason not to treat these other press wrongs as falling within the scope of these exceptions.¹⁰⁷

¹⁰⁵ Emmanuel Dreyer, 'L'Auteur de l'Infraction de Presse: Auteur Naturel ou Artificiel?' (2008) 9 *Droit pénal étude* n°18.

¹⁰⁶ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IVA2.

¹⁰⁷ Dreyer, 'L'Auteur de l'Infraction de Presse' (n 105), 9.

The second issue arises in relation to the rule according to which the person who committed the preliminary wrong should also be held liable independently for his actions. When publishers are held liable on the basis of article 29, authors are not necessarily prosecuted on the basis of articles R621-1-R621-4 of the Criminal code. Dreyer notes that this can be explained on the basis of the special rules contained in the 1881 law. According to article 43, the author of a statement is automatically treated as the publisher's accomplice. Making him liable for the preliminary wrong as well would contravene the principle of *non bis in idem*.¹⁰⁸

Overall, his justifications rely on treating press wrongs as a unique type of *infraction de conséquence*, justifying that exceptional rules be applied to them. It is a reasoning that is directly linked to that which led to the adoption of a unique procedural framework for press wrongs. To that extent, it is in line with the doctrinal understanding of press wrongs and so is convincing.

Nevertheless, two more fundamental critiques can be made against this interpretation. The first is the same that was made in relation to the publisher's negligent failure to comply with his official duties in relation to the necessary mental element of the wrong of defamation. It is that the publisher's actions do not meet the definitional elements of defamation, and that his liability should consequently not be based on the wrong of defamation. Indeed, the moral element of the offence of defamation is characterised by proof of intent. This intent is often reduced to its general element (*intention coupable*), when in fact it also covers a special element, intent to publish.¹⁰⁹ But one should avoid moving from one extreme to the other: if the necessary *mens rea* in the law of defamation is not characterised solely by the *intention coupable*, it is equally not characterised solely by the intention to publish. In theory, both are needed to ground liability. In that sense, the analysis proposed above is not satisfactory. A *mens rea* limited to intent to publish does not reflect the constituent elements of the French wrong of defamation.

¹⁰⁸ Ibid.

¹⁰⁹ See above, IIB.

More fundamentally, Dreyer appears to be missing a step in his approach to publication. While it is true that the characterisation of press wrongs depends on their publication, it is not clear why the author's statement should automatically fail to meet this standard. Indeed, the definition of publication in article 23 of the 1881 law is extremely broad. It is not limited to the actual physical publication of materials. Rather, it covers speech, cries and threats uttered in public places as well any other medium of communication covering writings, images and speech that are sold, distributed or displayed in public places, or transmitted online. In this context, any communication of a statement to a third party constitutes publication for the purposes of article 23. The publisher's act is simply one of publication in the commercial sense, which also characterises publication in the broader 'legal' sense of article 23. And so it is unclear why Dreyer does not acknowledge the communication of the disputed statement by the author to the publisher as an act of publication, in the legal sense. It may be the case that there are various instances of publication; however it is incorrect to assume that there is no publication on the author's part. Therefore, the publisher's liability for press wrongs cannot properly be understood as an *infraction de conséquence*.

c) Strict liability

The current rules applicable to (commercial) publishers under the law of 1881 are impossible to rationalise on the basis of general criminal law principles. In fact, this is due to a discrepancy between the constituent elements of wrong of defamation (publication coupled with intent to publish and *intention coupable*: thus requiring a fault element in the form of intention, understood in a criminal sense) and the publisher's primary liability. Despite the fact that the *mens rea* element of defamation is not characterised in respect of the publisher, he is liable as a primary defendant. This suggests that while he is responsible for his own actions (and not those of the author), his liability is strict. This view is further supported by the fact that although the author's responsibility is only secondary, the defence of *bonne foi* is assessed in relation to him, regardless of the fact that the claim is brought against the publisher. This may be seen as an implicit recognition of the fact that the commercial publisher's liability is not based on

fault, since the absence of any fault on his part will not allow him to escape liability. By recognising a regime of strict liability in respect of publishers, the criminal law departs from its general rule that *délits* require intention as the fault element. In doing so, it appears to move closer to tortious principles which recognise that liability can arise in the absence of fault on the defendant's part.

C. Comparative assessment of the role of fault

Relying on the above analysis, a basic analytical table comparing the rules applicable to authors and other defendants in English and French defamation proceedings can be drawn. The chosen categories of defendants (authors/other defendants) relies on the intuitive understanding that authors play a fundamental role in the defamation process. This comparative table would look as follows:

	England	France
Author	Conduct-based strict liability in tort, attenuated by: <ul style="list-style-type: none"> - Negligence standard in relation to publication - Various defences (involving the consideration of various types of malice) Note: these rules are also applicable to editors and publishers	Officially outcome-based intentional conduct, generating criminal liability <ul style="list-style-type: none"> - Aggravated by a presumption of intention - Attenuated by a wide-ranging defence of absence of negligence (<i>bonne foi</i>)
Other defendants	Fault-based liability in tort on the basis of a negligence standard (except for editors and publishers)	Criminal strict liability

It is interesting to note the permeation, in both jurisdictions, of notions of fault that span across the areas of tort and criminal law. Thus, English law relies on notions of malice which are typically encountered in criminal law; and French law relies on the typically tortious strict standard of liability. This is an indication that the link between the regulatory features and the standard of liability is a weak one. Beyond this shared feature, the table initially suggests that the role of fault offers little grounds for comparison between England and France. Authors are subjected to a strict liability standard in English law, and a negligence-like one in French law; the situation is reversed for other defendants, whose liability is based on a negligence standard in England and a strict liability one in France.

However, one fundamental problem arises in relation to this classification. It is that in England, contrary to France, authors do not constitute a distinct category of defendants. The rules outlined above in section IIIA are in fact applicable not only to authors, but also to editors and publishers.¹¹⁰

The comparability of the regimes appears when the terms of the table are amended to reflect the hierarchical lines along which responsibility for defamation is organised in English and French law. In a comparatively similar fashion to the law of accessory liability, each jurisdiction recognises that there is one type or class of defendants whose responsibility is sought in the first place; other defendants' liability is only secondary. In order to reflect this factual situation, the comparators change from author/other defendants to principal/secondary wrongdoers.¹¹¹ In England, reflecting the fact that they do not represent distinct categories of defendants, the principal wrongdoers are the author, the publisher and the editor; in France the sole primary responsibility falls upon the publisher or editor. Secondary wrongdoers in England only cover third parties with a lesser degree of involvement in the wrong; the category is wider in France since it includes not only those with such lesser involvement, but also the author.

	England	France
Principal wrongdoer	Conduct-based strict liability in tort, attenuated by: <ul style="list-style-type: none"> - Negligence standard in relation to publication - Various defences (involving the consideration of various types of malice) 	Criminal strict liability

¹¹⁰ Following s. 1(1) of the Defamation Act 1996 and s. 10 of the Defamation Act 2013, these defendants all fall within the same category of what I will label in the following paragraph 'principal wrongdoers'.

¹¹¹ The term 'principal' is used in a literal sense, independently of the connotations it carries in the law of accessory liability. These categories broadly correspond to Mitchell's categories of 'primary' and 'secondary' publishers (Mitchell (n 25), Chapter 6). The choice not to use this terminology is intended to circumvent the ambiguity generated by the existence of two types of 'publishers' in English law (in the common law and the commercial sense), as noted above (n 86).

	England	France
Secondary wrongdoer	Fault-based liability in tort on the basis of a negligence standard	Officially intentional conduct, - Aggravated by a presumption of intention - Attenuated by a wide ranging defence of absence of negligence

By changing the terms of the comparison, a common feature appears: England and France adopt comparable standards of liability. Indeed, in both England and France principal wrongdoers are held strictly liable; secondary wrongdoers are subjected to a negligence standard, whether in the cause of action or as part of a defence. Of course, differences subsist: in France, the principal wrongdoer is afforded no defence,¹¹² and while the secondary wrongdoer's liability is fault-based, the burden of proof is reversed as compared to England.

The two major findings of the preceding comparative analysis relate to the hierarchy of responsibility and the standards of liability. Although the hierarchy of responsibility differs as between the two countries, the standards of liability applied to primary and secondary wrongdoers are comparable. Beyond the simple recognition that each jurisdiction relies in part on notions of fault that do not correspond to their regulatory features, this finding fundamentally rejects the possibility of a link between the nature of the regulation and the standard of liability. Indeed, it becomes clear that English and French law share the same distinctive approach to the standard of liability in defamation *regardless* of the nature of their regulation.

IV. A shared conceptual approach to fault based on media accountability

The comparative analysis of the rules on fault in England and France in the previous section yields two important findings that require an explanation: the existence of a different hierarchy of responsibility and of comparable standards of liability. In this section, I rationalise the existence of these rules on the basis of

¹¹² Note that there are indications that the courts will in some instances allow a defendant publisher to escape liability: see below, n 153. It therefore remains appropriate to label their liability as strict, rather than absolute.

path dependence. I also justify their persistence on account of notions of embeddedness and societal factors. Throughout the section, it will become apparent that the concern to promote media accountability has historically been, and still is of fundamental importance. This reveals the existence of a shared conceptual approach to fault in the English and French laws of defamation.

A. Path dependence in the allocation and standards of liability

Against the historical background of the newspaper revolution,¹¹³ the common standards of responsibility are best explained on the basis of the theory of path dependence. Building on the historical analysis developed by Mitchell in relation to the English wrong, I extend his reasoning to the French wrong. I therefore argue that the different hierarchies of responsibility in England and France are the result of the different practical implementation of a shared underlying concern to hold media defendants accountable, which arose in the context of the newspaper revolution.

It has been noted that England and France share comparable standards of liability. Liability is strict for primary defendants, and fault-based for secondary defendants. While the latter standard is in line with the general rules on fault in tort and crime, the standards of liability for primary defendants are atypical. Indeed, in English tort law objective liability is the norm, with some points of strict liability; in French criminal law, according to article 121-3 of the Criminal code liability is fault-based, either in the form of intention or negligence. In fact, the shared choice of a strict liability standard for primary defendants owes much to the historical development of the law of defamation. It can be justified by the effect of social pressures at a time when the press was expanding rapidly.

Mitchell argues that in England, the emergence of strict liability for principal wrongdoers does not have a historically principled basis.¹¹⁴ He offers a robust argument, backed by his analysis of the case law. According to him, while

¹¹³ This expression was borrowed from Mitchell (n 25), 120.

¹¹⁴ See more generally: Mitchell (n 25), specifically Chapter 4.

malice was originally a constituent element of the law of defamation, it was mistakenly abandoned in the case of *Jones* in relation to words explicitly defamatory.¹¹⁵ The ruling was extended in *Cassidy*¹¹⁶ to words not explicitly defamatory. In that 1929 case, Mr Cassidy's engagement was announced and accompanied by a photograph of the said Mr Cassidy and a woman. However, Mr Cassidy was already married to another woman and his wife sued the publishers, alleging that the statement was defamatory toward her in that it insinuated she was living in sin. Though the statement was not *prima facie* defamatory, the newspaper was found liable on the basis of an innuendo, in the absence of any fault on the part of the defendant. *Cassidy* thus marked the final step in the 'transition from fault-based to strict liability'.¹¹⁷

By 1930, defamation had therefore become structurally similar to intentional torts; contrary to those, however, it had transitioned to such a structure. Indeed, the Lords' decisions in *Jones* and *Cassidy* did not trace the historical development of the legal rule in order to uncover past underlying policies which could justify its modern development in a given direction. Having examined the historical development of the notion of malice in the law of defamation, Mitchell notes that there are no such underlying justifications which could justify the development of *Jones* and *Cassidy*. Rather, he interprets the departure from the fault-based standard as a policy choice at a time when the popular press was expanding rapidly.¹¹⁸ The behaviour of some newspapers called for a stricter standard of liability so as to improve media accountability.

This argument is convincing, particularly so in light of the parallel development of the strict liability standard applicable to publishers and editors in France. In that jurisdiction, the 19th century was characterised by the swift development of the press. Following the proclamation of the rights to freedom of opinion and of expression in the Declaration of the Rights of Man and the Citizen, the number of newspapers flourished. However, no system of responsibility had been

¹¹⁵ See above, IIIA1.

¹¹⁶ *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, [1929] All ER Rep 117.

¹¹⁷ Mitchell (n 25), 112.

¹¹⁸ *Ibid*, 120.

established to regulate the abuses of these rights. The realisation that newspapers were committing wrongs that were left unpunished generated a sudden wave of repression.¹¹⁹ Subsequently, between the Revolution and the advent of the Third Republic in 1870, laws succeeded each other rapidly, subject to the rulers' will to limit the scope of the right to freedom of expression and to contain the pressure of public opinion.¹²⁰ By the time the Constitution of 4 November 1848 was enacted, the press was no longer seen as the object and beneficiary of a fundamental right; it had become a competitor for power.¹²¹ In the words of Avenel,

*'À aucun moment de notre histoire, la presse n'a joué un plus grand rôle, et n'a mieux mérité d'être appelée un quatrième pouvoir dans l'État.'*¹²² At no point in our history did the press play a more important role, and deserve to be called a fourth branch of the state.

In order to contain this power, strict standards of liability were needed so as to ensure that media defendants would be held accountable. The focus was therefore less on the risk of duels caused by the publication of defamatory statements, but rather on the seditious character of the materials printed by powerful newspaper defendants.¹²³ Beignier notes that damage caused by press wrongs could be severely assessed,¹²⁴ to the detriment of the newspaper defendant. The choice of no-fault liability, rather than an intermediate negligence standard, was justified by two practical difficulties arising in relation to the imposition of liability on the publisher or the editor (whose primary liability is

¹¹⁹ Claude Bellanger, *Histoire Générale de la Presse Française*, vol 2 (PUF 1969), 5.

¹²⁰ For an overview of the regulation of the press in between the Revolution in 1789 and the advent of the Third Republic in 1870, see Bellanger (n 119), including the excellent summary on pp. 5-10.

¹²¹ Beignier *et al* (n 9), 56. Bellanger (n 119), 4 characterises it as '*une zone d'indépendance à l'égard du pouvoir politique*' (a zone of independence from political power).

¹²² Henri Avenel, *Histoire de la Presse Française: Depuis 1789 Jusqu'à Nos Jours* (Flammarion 1900), 233. As early as 1809, Napoleon had recognised the extent of the powers of the press by considering that it was better characterised as a branch of state power rather than as a mere business or industry. See: Ferdinand Grimont, *Manuel-Annuaire de l'Imprimerie, de la Librairie et de la Presse* (P Jannet 1855), 12.

¹²³ This echoes the distinction between political and private libels in the early English law of defamation. See Chapter 2: The framework of defamation liability in comparative historical perspective, IIA1 and IIIA.

¹²⁴ Beignier *et al* (n 9), 62.

explained below). Requiring them to be aware of the entirety of the contents of the newspaper was not feasible, and the claimant lacked the means to establish the director of publication or editor's knowledge or negligence.

Mitchell notes that by the time the English cases of *Jones* and *Cassidy* abandoned the criteria of fault, judges primarily saw libel as part of media rather than tort law.¹²⁵ The strict standard was designed to apply to all those related to the press organs, whether they be authors (journalists), publishers or editors. The consequence of these cases is that this rule also came to be applied outside the newspaper context, in the law of tort, to private individual defendants. It has been preserved to this day (although it is arguable that statutory intervention in relation to defences has attenuated the strictness of liability).¹²⁶

Likewise, France shared this idea of a law 'for' the press. Indeed, by the 19th century the large majority of defendants were newspapers.¹²⁷ However, this led the legislator to introduce in the 1881 law a hierarchy of responsibilities different from that found in the English tort of defamation. The author lost his position of primary defendant, as had traditionally been the case under the law of 17 May 1819.¹²⁸ The logic was that the difficulty in identifying the author of the

¹²⁵ Mitchell (n 25), 120.

¹²⁶ See: James Goudkamp, 'Statutes and Tort Defences' in T T Arvind and Jenny Steele (eds), *Tort law and the Legislature* (Hart Pub 2012). Of specific interest in this context are the defences of truth (previously 'justification'), honest opinion (previously 'fair comment') and various instances of privilege. Truth, a common law defence, was modified by the Defamation Act 1952 in order to make it more lenient. S. 5, reiterated in ss. 2(2) and 2(3) of the 2013 Act, introduced the concept of partial justification, which benefits the defendant insofar as where there exist distinct defamatory allegations, an unproven allegation will not defeat the defence where it does not materially injure the claimant in respect of the distinct true allegation. Similarly, s. 6 of the 1952 Act introduced a measure of leniency in the defence of honest opinion (then 'fair comment'): under the common law defence, any falsity of the facts grounding the opinion would preclude relying on the defence; following statutory intervention, the defence 'shall not fail only because the truth of every allegation of fact is not proved, provided that the comment is honestly made having regard to the facts alleged that are proved to be true'. Another instance of statutory intervention benefiting the defendant is that of the 1996 Act, which tweaked the defences of qualified and absolute privilege by providing for a possible waiver of the qualified privilege in cases where it works against the defamed claimant himself (s. 13), and widened instances of absolute privilege (s. 14). Further pro-media revision of English defamation law is examined below in section IVB2.

¹²⁷ See above, Chapter 2: The framework of defamation liability in comparative historical perspective, IVB.

¹²⁸ Art. 24 of the law of 17 May 1819 stated that printers of defamatory statement could not be held liable where the author had been convicted of the wrong, unless their liability could be

statement¹²⁹ and the increased financial guarantees that a newspaper could offer a defamed claimant justified that it be liable *in lieu* of a private defendant.¹³⁰ However, the introduction of such a standard was not directed to the whole of the newspaper entity. Rather, it is the publisher and the editor who became the primary defendants because of their increased responsibilities in the publication process;¹³¹ the newspaper entity as a whole remained liable only for the payment of damages under article 44.

So, in both England and France, historical factors led to the choice of a strict standard of liability. Nevertheless, although both sought to regulate the activity of newspapers, England and France introduced a distinct hierarchy of responsibility. Interestingly, this focus on newspapers and the concern to promote media accountability evidences an important change in the law of defamation. The law of defamation as it developed in the English royal courts was originally focussed on the claimant's economic losses; in France it focussed on the risk of breaches to the public peace caused by duelling.¹³² The fact that it distanced itself from this exclusive focus is due to changes in historical and social circumstances: partly because the practice of duelling was dying out,¹³³ and partly because defamation no longer only involved private parties but also entities which were seen as competitors for power. This would, in time, have practical consequences. By no longer solely focusing on compensating economic

established under the principles of accessory liability in art. 60 of the 1810 Criminal code. This clearly shows that the primary liability was that of the author.

¹²⁹ Claude Bellanger, *Histoire Générale de la Presse Française*, vol 3 (PUF 1969), 18.

¹³⁰ See, before the 1881 law: Cass, 29 June 1844 as reported in Dalloz (frères), *Répertoire Méthodique et Alphabétique de Législation, de Doctrine et de Jurisprudence*, vol 36 (Paris 1856). Also see above, Chapter 2: The framework of defamation liability in comparative historical perspective, IIB1.

¹³¹ Cass crim, 23 February 2000, RSC 2000, 611, obs Mayaud. This interpretation explains the discrepancy of treatment of editors in England and France: in the former, seen as part of the newspaper entity, he is a primary defendant; in the latter, seen as being detached from the publication decision, he is only third in the hierarchy of responsibilities.

¹³² See Chapter 2: The framework of defamation liability in comparative historical perspective, IIB2. The claim that the English law of defamation was originally concerned solely with the claimant's economic losses refers to the action on the case developed by the common law courts. Indeed, their ability to award monetary damages distinguished them from the ecclesiastical courts. See: *ibid*, fn 14.

¹³³ In England, see V G Kiernan, *The Duel in European History: Honour and the Reign of Aristocracy* (OUP 1988), 7; in France the period between 1840-1870 was marked by a drastic decline in the practice of duels, with a resurgence of duels at the end of the 19th century until their steady decline at the end of the Great War. See generally: François Guillet, *La Mort en Face: Histoire du Duel de la Révolution à nos Jours* (Aubier 2008).

losses and on punishing the (risk of) breaches to the public peace, the law was making a first step towards the recognition of other modes of protecting reputation. What these are, and their appropriateness in the modern law of defamation, will be the subject of further analysis in Chapter 5.

The English and French standards of liability applicable to primary defendants, which do not comply with the general rules on fault in tort and crime, were shaped by historical circumstances. They can be rationalised on the basis of path dependence. However, they illustrate another facet of path dependence than the one referred to in Chapter 2 to justify the English and French regulatory features. We can again rely on Bell's explanation of path dependence, but focusing on another part of his statement, which was previously omitted.

‘[Path dependence] suggests that established legal approaches to the solution of issues will determine the way in which new situations or new problems are handled in the present and in the future. Legal development is explained ... by the effect of social and economic pressures operating on the law from the outside at the current time’.¹³⁴

The choice of a no-fault regime for primary defendants originated in historical and social factors. These arguably put pressure on the law to establish a stricter regime of liability for newspapers. In that sense, the standards of liability are a good example of another facet of the theory of path dependence.

B. A shared approach to fault

It is questionable whether these rules are still appropriate today. But, in both England and France, there are indications of resistance to change in relation to the standards of liability. There are two reasons for this: not only are the rules on fault embedded in the law, but societal factors calling for greater media accountability have prevented any possible legal development despite the existence of impetuses for change.

¹³⁴ Bell (n 1), 787-88.

1. Questionable appropriateness of traditional standards of liability

The current standards of liability are at odds with the general rules on fault in tort and criminal law. Whether they are still appropriate in the current legal landscape is questionable, both in England and in France.

In England, the principle is that professional responsibility now turns on lack of reasonable care; the strict liability standard of defamation is an exception.¹³⁵ Indeed, some law firms refer to this practice area as ‘professional negligence’, clearly linking both concepts.

In France, the conceptual approach to the law on the press has been corrected by doctrinal writers, and is no longer centred on media defendants. Scholars emphasise the law’s original spirit and meaning, focusing on the regulation of any and all abusive statements meeting the requirement of publicity in article 23.¹³⁶ These abuses may be committed through the media, but it is not the only way that they can be characterised, and media defendants are no longer the primary focus of the law of defamation.¹³⁷ This suggests that the strict standard established at a time when, and based on the fact that, primary defendants were in the great majority of cases newspapers is no longer the most appropriate.

Yet, while the English and French rules on fault applicable to primary defendants are no longer the most appropriate ones, they are resistant to change. This is both because they have become incorporated in the legal infrastructure of defamation, and because any potential impetuses for change have succumbed to societal factors favouring the maintaining of the *status quo*.

¹³⁵ Mitchell (n 25), 120.

¹³⁶ Beignier *et al* (n 9), 8.

¹³⁷ Ibid, 3.

2. Path dependence and embeddedness of concepts

Bell notes that ‘path dependence is connected with notions of embeddedness.’¹³⁸ While existing solutions might be inefficient, they persist because they are embedded in the legal system. Such a proposition is illustrated by reference to the distinction between libel and slander. It is not of ‘great policy significance’,¹³⁹ and in fact lacks a principled basis.¹⁴⁰ Yet, it is a distinction that survives to this day. Libel and slander constitute two separate torts with distinct rules applicable to each. This reasoning is equally applicable to the English and French rules on fault applicable to primary defendants. They are at odds with the general rules on fault in tort and criminal law; however legal change, if at all existent, has been carried out within the existing framework.

In England, the Defamation Act 2013 has failed to positively introduce or appropriately recognise a fault-based standard, despite earlier recommendations. As early as 2005, Mitchell suggested that the English standard of strict liability was no longer appropriate.¹⁴¹ As a tool facilitating the imposition of liability on media defendants, it did not comply with the modern trend which is to make professional liability turn on the absence of reasonable care.¹⁴² It was also illogical to apply it to non-media defendants, since it had always been drafted in order to impose a stricter standard of liability on newspapers. Therefore, Mitchell recommended the introduction, in the constituent elements of the tort, of a fault standard applicable to both media and non-media defendants.¹⁴³ His recommendation is not isolated; various actors of the libel reform movement also suggested a shift in the paradigm of liability.¹⁴⁴ This alternative approach would

¹³⁸ Bell (n 1), 797.

¹³⁹ Ibid, 798.

¹⁴⁰ See above, Chapter 2: The framework of defamation liability in comparative historical perspective, IVA.

¹⁴¹ Mitchell (n 25), 120-21.

¹⁴² Ibid, 120.

¹⁴³ Ibid, 121.

¹⁴⁴ Index on Censorship/English PEN, ‘Free Speech Is Not for Sale: The Impact of English Libel Law on Freedom of Expression’ (*Libel Reform*, 10 November 2009) <www.libelreform.org/reports/LibelDoc_LowRes.pdf> accessed 17 June 2015, 8; Editorial, ‘Unjust Burdens of Proof’ (2009) 459 *Nature* 751.

have implemented, in England, a duty of care not to defame another person when exercising the right to freedom of expression.¹⁴⁵ However, the Defamation Act 2013 has failed to introduce such a fault-based standard of liability.

This is not to say that there has been no relaxation of the strict liability standard in defamation. In fact, the two decades preceding the introduction of the 2013 Act featured a distinct pro-media revision of English defamation law. Mullis and Scott summarised the changes to common law and practice as follows:

‘The most obvious changes in libel law have come in relation to the curtailment of damages and the development of *Reynolds* “public interest” privilege... The Court of Appeal now exercises considerable control over the level of damages, with the effective maximum now just over £200k. Moreover, the award of even half that amount is a rare occurrence... The development of *Reynolds* privilege and the related “reportage” defence have widened substantially the room for error afforded to the media when reporting on matters of public interest... The defence of “fair comment” [now honest opinion] has been revitalised and is more accommodating of free speech than previously. Certain legal entities have been found to lack the capacity to bring a claim for defamation, and others treated as effectively libel proof. The enactment of the “offer of amends” procedure enables a media defendant that “has got something wrong” to apologise, and for so doing to get a substantial reduction on the damages that it would otherwise have to pay. The “summary disposal” procedure under section 8 of the Defamation Act 1996 allows a court, in practice usually on application by the defendant, to weed out weak cases at a relatively early stage.’¹⁴⁶

¹⁴⁵ Descheemaeker notes that the introduction of this standard of liability is not unknown in common law jurisdictions. It was proposed as early as 1909 in Australia in the context of the Defamation (Amendment) Act 1909 (NSW). See: Descheemaeker, ‘Mapping Defamation Defences’ (n 2), 662.

¹⁴⁶ Alastair Mullis and Andrew Scott, ‘Something Rotten in the State of English Libel Law?’ (2009) 14 Comms L 173, 174-75.

The result of these changes is that a new balance was found between the conflicting rights to reputation and to freedom of expression. This new balance is more favourable to defamation defendants; yet, when these changes came along, the existing standards of liability were not questioned. Rather, they were carried out within the pre-existing framework. Thus, the reason for which a negligence standard of liability was not introduced is due – at least in part – to the fact that there is a habit of dealing with the defamation standard of liability in a particular way. In that sense, the rule is embedded in English defamation law.

In France, there has been no change in legal rules despite the fact that their current content is problematic. The major problem is that there is a discrepancy between the allocation of primary liability, which falls on the publisher, and the maintaining of *intention coupable* as an official constituent element of the wrong. This situation necessarily and directly conflicts with the provisions of the Criminal code.¹⁴⁷

Yet, when considering potential reforms of the law of defamation, the Guinchard Commission did not suggest any changes to the rules on fault.¹⁴⁸ One conceivable alternative to the current system could have been to change the hierarchy of responsibility. On the model of the *lois de Serres*, the list of principal defendants for the offence could be organised as follows: (1) the author, (2) the publisher or editor, (3) the printer, (4) the vendor or distributor. This regime would reflect the reality of the wrong, in which the author is the primary wrongdoer. It would be compatible with the current provisions of the law, including the permanence of the requirement of *intention coupable*, the assessment of *bonne foi* in relation to the author, and the fault requirements of article 121-3 of the Criminal code. Finally, it would maintain the strengths of the current system. The current system of cascading responsibility was thought to present a major advantage in that it remedied identification issues.¹⁴⁹ Where the

¹⁴⁷ See above, IIIB2.

¹⁴⁸ Commission sur la répartition des contentieux présidée par Serge Guinchard, *L'Ambition Raisonnée d'une Justice Apaisée* (La documentation française: Rapports officiels 2008), 290ff only recommends the decriminalisation of defamation.

¹⁴⁹ Cons constit decision n°2011-164 QPC of 16 September 2011, Mr Antoine J [Responsibility of the 'producer' of an online website].

author of an article was anonymous or writing under a pen name, the victim could seek the responsibility of the publisher, whose name and coordinates are always printed in the newspaper. But no specific identification issues would arise under the proposed new system. In cases where the author could not be identified, the publisher would automatically become liable on the basis of the system of *responsabilité en cascade*. Further, it would not raise any compensation issues in relation to the author's potential insolvency.¹⁵⁰ Indeed, article 44 of the 1881 law provides that it is the newspaper owner (rather than the actual defendant) who pays compensatory damages awarded on the basis of the victim's *action civile*. This rule would remain unchanged, and thus the victim's compensatory rights would not be affected.

A second realistic change to the current system could have been to maintain the current hierarchy of responsibility but to introduce a no-fault defence in relation to publishers. I noted above two practical difficulties which were advanced to justify the choice of a no-fault standard for publishers: that of requiring the publisher to be aware of the entirety of the contents of the newspaper, and of establishing the publisher's knowledge or negligence. These arguments are easily rejected. Together with the help of the workforce that is meant to assist the publisher in his supervisory duties, he can be held to have actual or constructive knowledge of the contents of the newspaper. Further, the evidential difficulties could simply be remedied by reversing the burden of proof (thus requiring the publisher to prove he was *not* negligent), which is in essence what has been done in respect of authors in the context of the defence of *bonne foi*. Besides rejecting the reasons which grounded the choice of a strict standard of liability, there are at least two positive reasons justifying the introduction of a wide-ranging defence based on negligence. The first reason is that such a proposed regime would align the rules applicable to newspaper publishers with those applicable to online publishers. Currently, under article 93-3 of the law of 29 July 1982 on online communications as amended by the law HADOPI 2,¹⁵¹ although the online

¹⁵⁰ On the defendant's insolvency being a concern of the legislator, see Chapter 2: The framework of defamation liability in comparative historical perspective, IIIB1.

¹⁵¹ Art. 27 of the *loi n°2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet*.

publisher is presumed liable for defamatory content, he can rebut the presumption by showing that (1) he did not know of the message or that (2) if he did know, he acted quickly to remove the message. The second reason is that the introduction of a negligence standard as a defence would allow a rationalisation of the rules applicable to publishers on the basis of general principles of criminal liability. Both elements of the criminal wrong would be characterised: the publisher's *actus reus* would be the act of publication, and the *mens rea* would indeed be his negligence. And so this would not conflict with article 121-3 of the Criminal code.

Besides the Guinchard Commission's passivity in proposing changes in relation to the standards of liability, resistance to legal change has also come from the legislator. The law of 9 March 2004 removed the principle according to which corporations could only be criminally liable in cases provided for by law or regulation. In theory, its effect on defamation should have been to make the newspaper corporation liable instead of the publisher. However, this law was held not to apply to press wrongs,¹⁵² and no specific justification was given. The publisher, who represents the corporation, remains the sole primary defendant.

There have been indications that the standards of liability might on occasions be relaxed. Thus, in 2001 one case in the *Cour de cassation* allowed a publisher who could prove that it was impossible for him to read the article containing the defamatory statement to escape liability.¹⁵³ However, the contrast between this willingness to make the standards of liability less stringent and the French legislator's reluctance to change the system established in the law on the press is illustrative of the fact that the rules on fault are embedded in the law of defamation.

¹⁵² Art. 43-1 of the law of 29 July 1881. On the incoherence of this rule with those applicable to non-public defamation and *injures*, for which corporations can be made liable, see: Emmanuel Dreyer, *Responsabilités civile et pénale des médias*, 795.

¹⁵³ Agathe Lepage, 'Vigilance d'un Directeur de Publication Prise en Défaut' (2002) 2002(3) CCE comm. 48. Note, however, that this is an isolated case in the French Supreme Court.

According to Bell, there exist two levels of embeddedness. One is superficial, and only involves a special rule which expresses a habit of dealing with an issue in a particular way. The other one is deep; it involves not only a customary way of addressing an issue but also signs of interconnectedness to other parts of the law.¹⁵⁴ The degree of embeddedness is directly correlated to the facility in bringing legal change. When a rule is deeply embedded, change is difficult because it also involves changing institutional arrangements.

No specific structural or organisational aspects of the system underpin the English and French rules on fault. In theory therefore, because they are not deeply embedded, change should be easier to bring about (though it may need to be prompted by an external impetus).¹⁵⁵ Yet, despite the presence of impetuses for change, the rules on fault have resisted reform in both England and France. What this suggests is that there exist other factors, external to the law itself, which have prevented legal change.

3. Media regulation and greater media accountability

In both England and France, the persistence of the traditional standards of liability must be read against the perceived need to increase the accountability of media defendants. The result of the renewed relevance of the concern to hold media defendants accountable is the emergence of a shared conceptual approach to the rules on fault in England and France.

In England, the phone hacking scandal of the past decades revived a debate about privacy and media freedom which led the government to establish inquiry led by Lord Justice Leveson into the culture, practices, and ethics of the press.¹⁵⁶ In its executive summary, the Report concluded that:

‘The press is given significant and special rights in this country... With these rights, however, come responsibilities to the public interest... In

¹⁵⁴ Bell (n 1), 805.

¹⁵⁵ Ibid, 795.

¹⁵⁶ Brian Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (TSO 2012).

short, to honour the very principles proclaimed and articulated by the industry itself (and to a large degree reflected in the Editors' Code of Practice). The evidence placed before the Inquiry has demonstrated, beyond any doubt, that there have been far too many occasions over the last decade and more... when these responsibilities, on which the public so heavily rely, have simply been ignored... This has caused real hardship... This is not just the famous but ordinary members of the public, caught up in events... far larger than they could cope with but made much, much worse by press behaviour that, at times, can only be described as outrageous.¹⁵⁷

Defamation reform as enacted in the 2013 Act must be read against this background. The reform movement was prompted by a public debate which characterised the law of defamation as it then stood as unduly restrictive of freedom of expression.¹⁵⁸ But the timing of this debate coincided with the Leveson inquiry, which originated in the unethical practices of some parts of the press. So the reason for which a negligence standard of liability was not introduced in the 2013 Act is not only due to the fact that there is a habit of dealing with the defamation standard of liability in a particular way. It is also due to the societal context in which reform was carried out, and which made it impossible to invert the paradigm of liability.

By contrast in France, the press had traditionally been reluctant to publish stories on the private lives of individuals. This is famously attested by the refusal to publish materials relating to President Mitterrand's extramarital affairs.¹⁵⁹ But the Leveson inquiry Report noted that:

¹⁵⁷ Brian Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary* (TSO 2012), 4.

¹⁵⁸ See, for instance: Index on Censorship/English PEN, 'Free Speech Is Not for Sale: The Impact of English Libel Law on Freedom of Expression' (n 144). This view was also advanced by newspaper publishers: see those cited by Mullis and Scott, 'Something Rotten in the State of English Libel Law?' (n 146), fn 1.

¹⁵⁹ Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (n 156), 1723.

‘Increasingly French newspapers and, particularly, celebrity gossip magazines are challenging this traditional reluctance to publish content that may be regarded as private and such stories are increasingly the norm in France. The recent publication of the photographs of the Duchess of Cambridge may be part of this trend.’¹⁶⁰

Indeed, the change in trends is perhaps most evident when considering the media coverage offered to President Hollande’s affair with famous French actress Julie Gayet in 2014. The media were faced with a factual situation resembling that described above in relation to President Mitterrand. Yet, their attitudes were completely different, and the coverage of the affair was extensive.¹⁶¹

It is important to keep this change in the French press culture in mind when considering the French system of press regulation. Contrary to most countries, France does not have a Press Council. Media regulation results from both informal systems of self-regulation and the application of the existing legal provisions regulating the press.¹⁶² These provisions are primarily found in the law of 29 July 1881 and article 9 of the Civil code, which protects an individual’s right to privacy. So any impetus for legal change must originate in the modification of these provisions. I explained above that no such change has happened in the context of the 1881 law. The possibility to relax the strict liability standard is presumably frustrated due to the fact that unethical practices are becoming more and more common. This is not to say that the persistence of the inappropriate French standards of liability owes exclusively to this change in press culture. It is difficult to make this assertion because, contrary to the English situation, there is no direct correspondence in the timings of (proposed) legal change and the evolution of press culture. But it is undoubtedly a factor which, in addition to the embeddedness of the current standards, has contributed to a lack

¹⁶⁰ Ibid, 1724.

¹⁶¹ In this sense: ‘Hollande’s Affair Is a Break With French Tradition’ (*Index on Censorship*, 14 January 2014) <<https://www.indexoncensorship.org/2014/01/the-loss-of-a-right-to-privacy-for-french-presidents/>> accessed 18 September 2015.

¹⁶² Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (n 156), 1724.

of discussion on this subject. The result is that the current standards of liability, despite being inappropriate, are ossifying in the law on the press.

Thus, the concern to promote media accountability has recently been renewed. At the time of the newspaper revolution, it justified in both jurisdictions the introduction of strict liability standards for primary wrongdoers. It also explains why recent changes to the rules on fault, if at all existent, had to be implemented within the pre-existing frameworks of liability. This reveals an enduring shared conceptual approach to the rules on fault in England and France, which specifically focuses on media defendants in order to improve their accountability.

V. Conclusion

This chapter has sought to shed light on the current rules on fault in the English and French laws of defamation, which are at odds with the most common fault standards in tort and criminal law.

One obvious conclusion of the preceding analysis is that England and France's regulatory features have had a limited influence on their standards of liability. Indeed, a comparison reflecting each system's distinct hierarchy of responsibility suggests that they implement comparable standards of liability in order to regulate the activities of the media. The explanation for this is found in the theory of path dependence: social circumstances called for the implementation of a strict standard of liability. However, the outcome of the social pressures operating on the law from the outside differed. Each system found a different balance between the responsibility of the individual wrongdoer and the financial guarantees sought to secure compensation for the claimant. These models of liability are no longer the most appropriate ones. Yet, because the rules are embedded in the English and French systems, and because the societal context calls for greater media accountability, they have resisted legal change.

Overall, the analysis of the rules on fault supports the argument formulated in the Introduction, that despite substantive differences owing to their different regulatory features, England and France adopt a shared conceptual approach to

defamation. Indeed, they implement comparable standards of liability and feature a common approach to fault based on a shared concern to promote media accountability.

CHAPTER 4

A SIMILAR DOCTRINE OF TRUTH ACROSS THE TORTIOUS AND CRIMINAL WRONGS OF DEFAMATION

I. Introduction

We saw in the previous chapter that historical factors led to a similar model of liability being established in England and France. Despite substantive differences, a clear pattern was identified in each jurisdiction's rules on fault. This finding supports the proposition formulated in the Introduction, that despite their distinct regulatory features the English and the French laws of defamation possess common features which reveal the existence of a shared conceptual approach.

The consideration of the defence of truth in the law of defamation is of paramount importance to determine whether or not England and France have a similar conception of the wrong. Indeed, the role of truth is directly linked to the nature of the regulation (tortious or criminal). In tort, the purpose is to compensate the claimant for his lost reputation. A recognised public policy principle considers the exposure of truth as the paramount interest, superior to that of protecting reputation. Consequently, liability only arises in relation to the publication of statements which cannot be proved to be true. On the other hand, it will be argued that in criminal law the purpose is to preserve the social peace. Punishment¹ is justified by the fact that the published statement disrupts the public order; consequently, truth is an irrelevant consideration and is not recognised as a defence. Therefore, at first sight, the nature of the wrong and the consequent purpose of the regulation dictate a distinct treatment of the notion of truth in each jurisdiction. Contrary to this, the present chapter establishes that there has been a gradual convergence in the conceptualisation of truth, to the point that its treatment has become practically analogous in England and France.

¹ On the proposition that tort primarily compensates the claimant and criminal law primarily punishes the defendant, see Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VE.

First, I give an overview of the historical development of the defence of truth in the two legal systems, as a foundation for the analysis in the following sections. Second, I analyse the fading link between the nature of the regulation (tortious or criminal) and the substantive rules on truth. Finally, I positively identify a similar doctrine of truth, exemplified by a shared value system and a common policy of promoting social cohesion.

II. The historical evolution of the defence of truth

It is impossible to understand the extent to which the English and the French rules on truth have grown similar without retracing their development. The present section therefore considers the historical evolution of the role of truth in the English and French laws, in the context of their tortious and criminal wrongs of defamation. This will provide the foundations for the subsequent sections, which analyse the implications of these developments.

The treatment of truth in the English civil law of defamation has already been the subject of extensive analysis.² It will therefore be dealt with succinctly, and more attention will be paid to the changes introduced by the Defamation Act 2013 and to its treatment in the (now abolished) law of criminal libel. There exist a few surveys of the French history of the principle, but their analysis is limited to certain periods of time.³ The following analysis is more extensive: it considers the origins of the defence before 1881 and is informed by recent case law developments.

² See: Eric Descheemaeker, ‘“*Veritas Non Est Defamatio*?” Truth as a Defence in the Law of Defamation’ (2011) 31 LS 1.

³ See, for instance: Bernard Beignier *et al*, *Traité de Droit de la Presse et des Médias* (Litec 2009), 785ff; Eric Descheemaeker, ‘Truth and Truthfulness in the Law of Defamation’ in Anne-Sophie Hulin *et al* (eds), *Les Apparences en Droit Civil* (Yvon Blais 2015). Both confine their analysis to the law of 29 July 1881, and for reasons of timing they do not account for the more recent developments.

A. English law

English law traditionally distinguished the treatment of truth in the civil and criminal laws of defamation. Contrary to its criminal counterpart, the civil wrong has always recognised an absolute defence of truth to defamation claims.

1. *The distinct treatment of truth in the tortious and criminal wrongs*

For the purposes of the tort of defamation, the truth of the defamatory statement is a complete defence. This rule is well established. It was already invoked in slander cases in the early 16th century.⁴ By the beginning of the 19th century, the proposition that the truth of the charge also acted as a complete defence in libel cases was widely accepted. Stated in Lord Holt's *Law of Libel* in 1812,⁵ for a long time it was officially grounded in the 1829 case of *M'Pherson v Daniels*.⁶ This principle was maintained throughout the 20th century legislative changes, although the defence was put on a statutory basis (to encourage a more liberal interpretation)⁷ and its name was changed (from justification to truth).⁸

According to the Explanatory Notes to the Defamation Act 2013, the recasting of the defence of truth 'is intended broadly to reflect the current law while simplifying and clarifying certain elements.'⁹ Section 2(1) restates the law as established in the case of *Chase v News Group Newspapers Ltd*,¹⁰ and provides that '[i]t is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.'

⁴ Richard H Helmholz (ed) *Select Cases on Defamation to 1600*, vol 101 (Selden Society 1985), lxxii; in fact the defence was already invoked in 1521: *Reymond v Lord Fitzwauter* 6 October 1521 (King's Bench), 2 Spelman Reports 2. Its validity was only disputed once in *Legat v Bull* Trinity Term 1533 (King's Bench), 1 Spelman Reports 6, which is considered and analysed in Descheemaeker, 'Veritas non est defamatio' (n 2), 5-7.

⁵ Francis Ludlow Holt, *The law of libel* (Stephen Gould, 1818), 277-78.

⁶ *M'Pherson v Daniels* (1829) 10 B & C 263, (1829) 109 ER 448.

⁷ Indeed, it was one of the recommendations of the Porter Committee that the defence of justification not be excessively narrowly interpreted. This led to the enactment of s. 5 of the Defamation Act 1952, which introduced a concept of partial justification.

⁸ S. 2 of the Defamation Act 2013.

⁹ Explanatory notes to the Defamation Act 2013, [13].

¹⁰ *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 218.

The rest of the section abolishes the old defence of justification,¹¹ and provides a new version of the rule found in section 5 of the Defamation Act 1952 in relation to statements which convey more than one imputation. Presumably, the intention of Parliament was essentially to restate the existing law,¹² so the changes are minor. Changes worth noting relate to the terminology used¹³ and to pleading practice, with the determination of meaning now being established as a preliminary issue.¹⁴

By contrast, criminal libel did not originally recognise a defence of truth. In the case *de libellis famosus*, which formally established the offence of criminal libel, Coke remarked that ‘it is not material whether the libel be true’.¹⁵ This rule was preserved when the common law courts inherited the Star Chamber’s jurisdiction in criminal libel.¹⁶ It was in fact one of the practical elements of the criminal offence that the newspapers contested and which prompted the 19th century legislative changes. This resulted in the enactment of section 6 of the Libel Act 1843, according to which:

‘The truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published’.

The basic principle of the criminal law of defamation therefore became that the truth of the statement could provide a defence only if it was published for the benefit of the community. This rule remained valid until the common law offence of criminal libel was abolished by the Coroners and Justice Act 2009.

¹¹ S. 2(4) of the Defamation Act 2013.

¹² See: Alastair Mullis and Andrew Scott, ‘Worth the Candle? The Government’s Draft Defamation Bill’ (2011) 3 JML 1, 7; Alastair Mullis and Andrew Scott, ‘Lord Lester’s Defamation Bill 2010: a Distorted View of the Public Interest?’ (2011) 16 Comms L 6, 12; Richard Parkes *et al*, *Gatley on Libel and Slander* (Sweet & Maxwell 2013), 11.2.

¹³ See, listing the new terminology and considering the potential uncertainty that it could cause: Parkes *et al* (n 12), 11.2.

¹⁴ See, for instance: *Rufus v Elliott* [2015] EWHC 807.

¹⁵ *De Libellis Famosis* (1606) 5 Co Rep 125a, 125b, 77 ER 250, 251.

¹⁶ Law Commission, *Working Paper No. 84, Criminal Libel* (1982), 2.7.

Repeated efforts to extend this principle to civil defamation cases were unsuccessful. The Report of the Select Committee preparing the 1843 Act had recommended the extension of the rule that truth alone is not a defence to the civil law of defamation.¹⁷ Although the principle was incorporated in the draft Bill, the House of Commons rejected it.¹⁸ This suggestion was revived in the 20th century. An effort was made to convince the Porter Committee to make a recommendation that this rule be adopted in respect of the tort of defamation. However, the Committee again rejected it.¹⁹ It considered that such a rule would impose an undue burden on the press by requiring it to guess whether or not a given subject was, in fact, in the public interest.²⁰ In 1975, the Faulks Committee also rejected this rule by arguing that the notion of public interest was too vague, and that it would be wrong to allow a defendant to benefit from his own wrongdoing.²¹

2. *The modern defence: particulars of the pleadings*

In direct line with the historical approach to the role of truth in civil defamation cases, the accepted rule in the tort of defamation is that truth justifies in and of itself. There exists one notable exception to this principle: under section 8(5) of the Rehabilitation of Offenders Act 1974, a publication referring to a spent conviction will not benefit from the defence of truth when actuated by malice.²²

¹⁷ Ibid, 2.11.

¹⁸ Ibid.

¹⁹ Porter Committee, *Report of the Committee on the Law of Defamation* (Cmd 7536, 1948), ss. 74-78. The Committee's reasoning was that it would make the authors' and journalists' work impracticable and that the rule would unduly restrict public discussion.

²⁰ Incidentally, this focus on the press echoes the one that was identified in the standards of liability and suggests that the law of defamation remains, to some extent, a law 'for' the media. See above, Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IV.

²¹ Faulks Committee, *Interim Report of the Committee on Defamation* (Cmd. 5571, 1974), 1; Faulks Committee, *Report of the Committee on Defamation* (Cmd. 5909, 1975).

²² This rule is a statutory innovation. Note that the case of *Leyman v Latimer* (1878) 3 Ex D 352, [1874-80] All ER Rep 1264 has sometimes been wrongly interpreted as having introduced a common law rule that it was actionable in defamation to publish a spent or pardoned conviction. Contrary to this, in this case the reason for which the defendant who had referred to the claimant as a 'convicted felon' was not able to rely on the defence of truth (then justification) was because his words suggested that the claimant had not yet undergone the relevant punishment. An extended analysis of *Leyman v Latimer* can be found in Descheemaeker, 'Veritas non est defamatio' (n 2), 9 (specially fn 47).

The modern approach to a plea of truth has been usefully summed up in the case of *Karpov v Browder*:²³

‘(1) Defamatory allegations of fact are presumed to be false: the “Presumption of Falsity.”

...

(4) What matters is that the substance or sting of the libel is proved. Inaccuracies, which do not materially affect the seriousness of the charge need not be justified. This common law principle is expressly recognised by the words “substantially true” in the new statutory defence of Truth set out in s.2(1) of the Defamation Act 2013.’²⁴

The basic principle is therefore that the burden of proof is on the defendant to prove the truth of the defamatory sting of the publication, rather than the literal truth of every fact.²⁵ The defence can only succeed where the meaning proved to be true is not materially less serious than the one that the words would reasonably have been held to bear.²⁶ Finally, if the defendant can only prove that part but not all of what he said was substantially true, under the rules of partial justification it must be considered whether the part of the defamatory statement which is not shown to be substantially true has or would be likely to cause serious harm.²⁷

If the defamatory statement was merely repeated, attributing it to another person cannot allow the defendant to escape liability.²⁸ Should the defence of truth fail, the defendant may try to avail an alternative defence based on the privileged character of the statement. The classical defence relied on is that of qualified privilege, whether based on statutory provisions²⁹ or on the historical common

²³ *Karpov v Browder* [2013] EWHC 3071, [2013] All ER (D) 153.

²⁴ *Ibid*, [124] (per Mr Justice Simon).

²⁵ *Edwards v Bell* (1824) 1 Bing 403, 409; *Clarke v Taylor* (1836) 2 Bing NC 654, 3 Scott 95; *Morrison v Harmer* (1837) 3 Bing NC 759, 4 Scott 524; *Walker v Brogden* (1865) 19 CBNS 65, 11 Jur NS 671; *Sutherland v Stopes* [1925] AC 47, [1924] All ER Rep 19; *Chase* (n 10), [34].

²⁶ Michael Jones *et al*, *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), 22-74.

²⁷ S. 2(3) of the Defamation Act 2013.

²⁸ *Parkes et al* (n 12), 11.18.

²⁹ See notably: sch. 1 of the Defamation Act 1996; s. 6 of the Defamation Act 2013.

law defence. The latter defence focuses on the circumstances in which the information was disclosed (rather than on the content of the information, as is the case for the truth defence) and rests on a duty/interest analysis. Lord Atkinson thus defined privileged occasions in *Adam v Ward*³⁰ as occasions

‘Where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.’³¹

The defence has been expanded by section 7 of the Defamation Act 2013 to cover reports of matters in which the public has a legitimate interest. As will be seen below, this balancing approach finds an echo in the way in which the defence of truth would be approached if Lord Steyn’s rights compliant ‘balancing test’ were to be adopted in the defamation context.³²

B. French law

Contrary to English law, much has changed in France since a very limited defence of truth (commonly labelled *exceptio veritatis*) was first recognised in the *lois de Serres*. An historical overview indicates a gradual acceptance, and widening of the scope, of the truth defence in defamation cases.

1. The traditional approach: irrelevance of truth

Mirroring the Roman law of *iniuria*, the *ancien droit* did not ordinarily recognise a defence of truth.³³ In the absence of any reference to the distinction between civil and criminal defamation, it is arguable that this rule applied to both the civil

³⁰ *Adam v Ward* [1917] AC 309, [1916-17] All ER Rep 157.

³¹ *Ibid*, 334.

³² See below, IVB3.

³³ Dareau seems to recognise a single exception, of limited scope: the truth of the statement would provide a complete defence where the defamatory statement was made *verbis* and consisted in a defence to an earlier provocative statement. See: François Dareau, *Traité des Injures dans l'Ordre Judiciaire: Ouvrage qui Renferme Particulièrement la Jurisprudence du Petit-Criminel* (Prault père 1775), 458.

and the criminal wrong. The principle that the truth of the statement was irrelevant to the defendant's liability was preserved in the 19th century, when the wrong of defamation was first recognised and given a tailored regulation in the 1819 *lois de Serres*.

However, this principle was not absolute. It was accepted that in some limited circumstances, the public interest in knowing the truth outweighed the need to protect an individual's reputation. Significantly, in contrast with its English counterpart, the French legislator did not admit that truth would act as a defence in *any* situation in which a public interest was identified. Rather, it identified two instances where this public interest would be recognised. First, as established in the law of 17 May 1819, the defence of truth was allowed in relation to statements directed at public or quasi-public officials in the exercise of their functions.³⁴ Indeed, in the interest of promoting a democratic society, it was necessary to be free to criticise public officials in the exercise of their function and to denounce state malfunctions.³⁵ Second, the law of 29 July 1881 broadened the scope of the *exceptio veritatis* to cover publications concerning directors or managers of companies having recourse to public offering.³⁶ Discussions on company managers' activities were felt to be crucial because of the existence of repeated financial scandals in 19th century France.³⁷ Overall, the French law of defamation thus adopted a more restrictive approach to the notion of public interest than its English counterpart.

2. Incremental development: the recognition of, and changing rules on truth

A major change to the regulation of the *exceptio veritatis* came in 1944, at a time when it was feared that some individuals may be found criminally liable in

³⁴ Art. 20 of the law of 17 May 1819.

³⁵ Maurice Patin, *La répression des délits de presse*, RSC 1954, 448; Maurice Garçon, *La Loi sur la Presse* (Renouard 1937), 15; Georges Levasseur, 'Réflexions sur l'*Exceptio Veritatis*' in *Mélanges Offerts à Albert Chavanne: Droit Pénal et Propriété Industrielle* (Litec 1990), 128.

³⁶ Art. 35, *alinéa* 2 of the law of 29 July 1881.

³⁷ Emmanuel Dreyer, *Responsabilités Civile et Pénale des Médias: Presse, Télévision, Internet* (3rd edn, LexisNexis, Litec 2011), 511.

defamation for truthfully denouncing acts of collaborations with the Nazi occupier.³⁸ The ordinance of 6 May 1944³⁹ consequently laid down the principle that the defence of truth would be available in all defamation cases, except in the specific circumstances listed in article 35, *alinéa* 3 of the law on the press. These circumstances covered statements that (a) related to the claimant's private life; (b) referred to facts which were over ten years old; or (c) had been pardoned, had been the subject of a judicial revision or were covered by the rules on limitations.⁴⁰

In recent years, however, two decisions of the *Conseil constitutionnel* have deemed paragraphs b) and c) of article 35, *alinéa* 3 to be unconstitutional. The grounds for challenging the provisions of the law of 1881 were articles 11 and 16 of the Declaration of the Rights of Man and of the Citizen. These provisions guarantee, respectively, the right to freedom of expression and the right to a fair trial and to the respect of the rights of the defence. In both cases, the *Conseil constitutionnel* considered that the wording of the 1881 law violated these provisions. Indeed, 'due to [their] general and absolute nature', *alinéas* 3 b) and c) were held to violate freedom of expression 'in a manner that is not proportionate with the goal pursued.'⁴¹ They have therefore been abolished.

3. *The modern defence*

Nowadays, the truth of the statement is therefore a complete defence in all defamation cases unless the statement relates to the claimant's private life. Defamatory statements are presumed false, and it is for the defendant to prove that they were true to escape liability.⁴² The formal rules regulating the adducing of evidence in a formal plea of truth are contained in articles 55 and 56 of the law of 29 July 1881, whose complexity has been described as 'a route filled with

³⁸ Patrick Auvret, *JCl. Communication*, Fasc. n°3130, 2002, 146.

³⁹ Ordinance of 6 May 1944, D 1946, législ 1, obs Mimin.

⁴⁰ Dreyer (n 37), 515ff.

⁴¹ Cons const, 20 May 2011, decision n°2011-131 QPC, cons n°6; Cons const 7 June 2013, decision n°2013-319 QPC, cons n°9.

⁴² Emmanuel Dreyer, *JCl. Pénal Code*, Fasc. n°80, 62.

pitfalls.’⁴³ Article 55 requires the defendant to formally inform the other parties of his intention to prove the truth of his allegations, and to share the evidence that he will use for this purpose. Article 56 sets out similar requirements for the responding party. Strict formal requirements must be complied with in relation to the timeframe and content of the production of evidence.⁴⁴ Failure to respect these formal rules results in the defence failing. The major difference with the English pleading is that the defendant must prove the complete and absolute truth of the statement;⁴⁵ the standard is therefore more stringent than in English law, where truth must be substantial rather than literal, and can be partial. But as is the case in English law, in cases where the defendant who reported a defamatory statement cannot avail the *exceptio veritatis*, other defences based on privilege may be relied on to evade liability.⁴⁶

On a cursory view, the great differences in the rules on truth are not found between the two legal systems (England and France), but rather between two areas of law (tort and crime). Indeed, it is accepted in tort that truth justifies *per se*. On the other hand, in criminal law both jurisdictions traditionally required an added element of public benefit, although the scope of this public benefit differed in England and France. The implications of these provisional findings are set out below.

III. The declining influence of the regulatory features on the conceptualisation of truth

In this section I argue that although there originally existed a link between the nature of the regulation and the rules on truth, this link is fading. I start by considering how the nature of the regulation dictated different rules on truth in each jurisdiction. I then analyse recent developments in the French law of defamation and argue that they have introduced a shift in the paradigm of

⁴³ *Rapport Annuel* de la Cour de cassation 2004, *La Vérité*: Sylvie Menotti, ‘La Preuve de la Vérité du Fait Diffamatoire’, 81. The result is that there is little relevant case law on the *exceptio veritatis*.

⁴⁴ For greater detail, see: Dreyer (n 37), 531-61.

⁴⁵ Art. 55 *alinéa* 1 of the law of 29 July 1881.

⁴⁶ Art. 41 of the law of 29 July 1881.

liability. As a consequence, both English and French law can now be said to protect reputation against false statements.

A. The original link between the nature of the regulation and the content of the rules

The original approaches to the role of truth in tort and crime can be rationalised very clearly if we consider the suggestion that torts are private wrongs and crimes are public wrongs.⁴⁷ Indeed, the different goals pursued by tort and crime dictate a distinct treatment of truth in each area of law.

The tort of defamation is designed to protect an individual's right in his reputation. It is, in itself, a limit placed on the right to freedom of expression to protect a private interest. The difficulty consists in scoping the wrong so as to appropriately reflect the importance of the right to freedom of expression. The main device for balancing these competing interests is found in defamation defences.

As was seen above, truth is one such defence. It is usually justified by reference to the principle stated in *M'Pherson v Daniels*, according to which 'the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess.'⁴⁸ But Tugendhat and Christie note that this does not justify refusing all defamation claimants a remedy because the information about them is true. Indeed, they point out that not all true information is relevant to an individual's reputation. For instance, true facts about a person's private life may not be relevant, especially if his reputation is based on his public acts.⁴⁹

⁴⁷ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VA.

⁴⁸ *M'Pherson v Daniels* (n 6), 451 (per Littledale J).

⁴⁹ Michael Tugendhat and Iain Christie, *The Law of Privacy and the Media* (OUP 2011), 7.33. They illustrate their reasoning by reference to *Youssouf v MGM Pictures Ltd* (1934) 50 TLR 581, where a Princess complained about an allegation that she had been raped. This was deemed defamatory in that it led people to shun, avoid or ridicule her; but it did not impute any misconduct or immorality. Tugendhat and Christie consequently ask why 'information about a

Despite this, truth in the tortious wrong of defamation remains an absolute defence. This is because the public interest in discovering and knowing the truth has historically underlined the right to freedom of expression. Truth is alternatively ‘regarded as an autonomous and fundamental good, or its value may be supported by utilitarian considerations concerning progress and the development of society’.⁵⁰ Consequently, while the protection of one’s private interest in reputation is a valid limit to the right to freedom of expression, the value of truth justifies that its exposure be considered the paramount interest.⁵¹

By contrast, the issue of truth or falsity of the defamatory statement was largely irrelevant to the criminal law of defamation. The criminalisation of defamation was originally grounded in the harmful consequences that a defamatory statement could have for the public: namely, the disruptions to the public peace. In England, the development of criminal libel by the court of Star Chamber aimed at punishing various instances of libel, including those ‘which were likely to cause private disorder or a breach of the peace.’⁵² The hope was that the legal remedy would be more appealing to a claimant than a challenge to fight.⁵³ Similarly in France, the wrongful interference with the victim’s honour and consideration, which characterises the French wrong of defamation, had harmful consequences on the claimant’s social standing.⁵⁴ This type of injury commonly provoked duels, over the course of which the defamed person tried to restore his reputation.⁵⁵

Significantly, the interests protected by the criminal wrong therefore differed from those protected by the tortious wrong, as set out in the previous sub-section. The focus was not on the injury to the claimant, but rather on the potentially harmful

person’s private and personal life’ should be relevant – ‘is it relevant, for example, to a prominent person’s reputation that he has HIV or AIDS?’ (Tugendhat and Christie, 7.34).

⁵⁰ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005), 7.

⁵¹ Tugendhat and Christie (n 49), 7.34.

⁵² *Working Paper No. 84, Criminal Libel* (n 16), 2.5.

⁵³ W S Holdsworth, *A History of English Law*, vol 5 (3rd edn, Methuen 1945), 210.

⁵⁴ Michèle-Laure Rassat, *Droit Pénal Spécial* (6th edn, Dalloz 2011), 515; Beignier *et al* (n 3), 785.

⁵⁵ Henri Morel, ‘La Fin du Duel Judiciaire en France et la Naissance du Point d’Honneur’ (1964) 19 RHD 574.

consequences for the public order. So, in that context, the paramount interest was the preservation of the public peace rather than the exposure of the truth. Consequently, the issue of falsity was generally disregarded by the criminal law of defamation. This justifies the original attitude of the English and French legislators to the defence of truth: treating it as an exception kept within strict bounds.

On a cursory view, there are great differences between England and France on the issue of the role of truth. In the English tort of defamation, the paramount importance of truth justifies treating it as an absolute defence. On the other hand, in the French criminal wrong of defamation the traditional (and, I argue below, out-dated) understanding is that due to the action's focus on preserving the public peace, the truth or falsity of the statement is largely irrelevant.

B. The modern change in the French paradigm: a shared focus on protecting reputation against false statements

The initial view outlined above is deceptive. On closer analysis, it appears that the two systems are becoming rather more similar than was originally the case. Indeed, recent developments in the French law of defamation illustrate a paradigmatic change in the rules on truth, which is bringing the French approach to truth closer to the English one.

1. From the exception to the principle

We have seen that for a long time the truth of the statement did not prevent liability from arising in the French law of defamation, except in limited circumstances. The indifference to the truth or falsity of the statement was addressed in the parliamentary debates preceding the adoption of the *lois de Serres*. These laws were the first to establish a wrong of defamation, which replaced the wrong of calumny that had existed until then in the 1810 Criminal code.⁵⁶ The core of the distinction between defamation and calumny was based

⁵⁶ Chapter 2: The framework of defamation liability in comparative historical perspective, IIB3.

on the (ir)relevance of the truth or falsity of the disputed statement, as is evident in the following abstract of the parliamentary debates:

‘Un seul point dans ce chapitre nous paraît exiger quelques observations particulières, c’est la substitution du mot diffamation au mot calomnie jusqu’ici employé par nos lois. Les motifs qui nous y ont déterminé sont simples. Le terme de calomnie, dans son sens vulgaire, qu’il est impossible d’effacer dans l’esprit des hommes, emporte avec soi l’idée de la fausseté des faits imputés. Une publication n’est donc réellement calomnieuse que lorsque les faits qu’elle contient sont faux. Cependant tous les législateurs ont senti qu’il est impossible d’autoriser tout individu à publier, sur le compte d’un autre, des faits dont la publication causerait à ce dernier un dommage réel, fussent-ils d’ailleurs vrais... La substitution du mot diffamation au mot calomnie fait disparaître, du moins en partie, cet embarras. La diffamation n’implique pas nécessairement la fausseté des faits, elle dénote, d’une part, l’intention de nuire, de l’autre, le dommage causé!’⁵⁷

There is only one point in this chapter which requires specific commentary: it is the substitution of the word *defamation* to the word *calumny* which was traditionally used in the law. The reasons dictating this choice are simple. The term of calumny, in its ordinary sense that is impossible to erase from the minds of men, carries with it the idea of falsity of the facts imputed. A publication is only really a calumny when the facts it contains are false. However, all the legislators have felt that it is impossible to authorise every individual to publish facts – whether or not true – relating to another person and whose publication could cause that person real damage... The substitution of the word *defamation* to the word *calumny* is remedying this issue, at least partly. Defamation does not necessarily imply the falsity of facts; it indicates on the one hand malicious intent, and on the other the damage caused!

There are nonetheless indications of a paradigmatic change in the attitude of the French legislator to the *exceptio veritatis*. The 1944 ordinance and the subsequent domestic cases that considered its implementation and the scope of

⁵⁷ Henry Celliez and Charles Le Senne, *Loi de 1881 sur la Presse, Accompagnée des Travaux de Rédaction* (Marescq Aîné 1882), 434-35, citing the *Exposé des Motifs des Lois de Serres*.

the *exceptio veritatis* manifest a changing attitude towards the truth defence. The refusal of a defence of truth traditionally dominated the French law of defamation, except in the two limited circumstances in which a public interest in publishing the statement was recognised. Contrary to this, the dual effect of the ordinance of 6 May 1944 and of recent developments in the French legal landscape was to establish a liberal approach, whereby the availability of the truth defence is no longer an exception but is the principle.

In the wake of the enactment of the ordinance it was suggested that the broad truth defence should only apply to the specific instances of defamation regulated by articles 30 and 31 of the 1881 law, which concern public officials. This is a convincing suggestion, which would have been in line with the original spirit of the 1881 law. Indeed, defamatory publications are more likely to serve some public interest in the context of articles 30 and 31 (which specifically regulate the publication of defamatory statements relating to the defamed person's public duties)⁵⁸ than in the context of article 29 (which regulates the publication of statements that are defamatory of a private individual). Thus, because it is more likely than not that a publication concerning a public institution or public official will be in the public interest, it would have been logical to reverse the rules only in the limited context of articles 30 and 31. There was no such reason which justified the introduction of a liberal approach to truth in the context of article 29.

Contrary to this suggestion, the courts adopted a broad interpretation of the rules contained in the ordinance. The *Cour de cassation* thus considered that the *exceptio veritatis* should apply to all instances of defamation, including those involving private individuals.⁵⁹ Further, the *Conseil constitutionnel*'s recent decisions have significantly reduced the number of exceptions to the principle that a defendant will not be liable for publishing a true defamatory statement.⁶⁰ The one remaining exception is found in article 35, *alinéa* 3 a) of the 1881 law,

⁵⁸ Dreyer (n 37), 432. This type of public interest echoes that which was recognised in the 19th century in relation to public officials and company managers having recourse to public offerings: see above, IIB1.

⁵⁹ See, for an early case on this issue: Cass crim, 12 November 1954, D 1954, 765.

⁶⁰ See above, IIB2.

according to which truth is not a permissible defence where the words complained of relate to the defamed individual's private life.

In this context, the concept of 'private life' is not aligned with either the Strasbourg conception of private life in article 8 of the European Convention on Human Rights (ECHR) or its domestic expression in article 9 of the French Civil code, which are understood to cover:

'[T]he right to privacy, the right to live, as far as one wishes, protected from publicity... the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.'⁶¹

The reason for this is historical. In the original version of the law on the press, the limited permissibility of the defence of truth was designed to promote transparency in governmental decisions and accountability. There were two situations in which a public interest was held to exist.⁶² All remaining matters were held, by comparison, to be 'private'.

When the ordinance of 1944 modified the truth defence, it did not change the definition of private matters. What the ordinance did do was to reverse the paradigm of the *exceptio veritatis*. It established a presumption that anything published is in the public interest so that the defendant did not have to positively prove the social utility of the publication. The result is that the ordinance cannot be said to have introduced an absolute defence of truth, subject to one exception. Indeed, despite the changes it brought to the *exceptio veritatis*, after the enactment of the ordinance the standard interpretation of the notion of 'private life' remains that designating publications 'not in the public interest'. In that sense, the availability of the defence of truth is still conditional on the publication's social utility.

⁶¹ *X v Iceland* Application 6825/74, (1976) 5 DR 86, 87.

⁶² See above, IIB1.

For the purposes of the (post-1944) 1881 law, the publication's public interest is characterised in relation to publications which have to do with the political, economic or social environment, or which interfere with the public's material or moral interests and generates a collective reaction of approval or disapproval. The definition of private life is residual. Any matters that do not correspond to these definitions fall within the scope of one's private life.⁶³ This distinct understanding of 'private life' has led one author to argue that the right to prove the truth of the defamatory statements remains an exception.⁶⁴

However, such 1881-specific conception of 'private life' is gradually disappearing. French law has come to positively recognise a right to privacy under article 9 of the Civil code, reflecting the new 'private sphere' that the law considers ought to be protected. Some authors predict that with the rise in defamation litigation involving private individuals, the concept of private life in the law of 1881 will come to accept that founded on article 9 of the Civil code,⁶⁵ which is largely aligned with the one in article 8 ECHR. This gradual evolution of the notion of private life would account for societal and legal changes. Breaches of the peace are no longer a high risk as they were in the 19th and early 20th century.⁶⁶ So there is no longer any reason to limit the defence of truth through the (post-1944) 1881-specific concept of 'private life', which constitutes an indirect incorporation of a public interest test to the admissibility of the defence of truth based on the need to protect the public peace. In fact, more recent pieces of scholarship have come to positively recognise truth as an absolute defence.⁶⁷ This suggests that the 1881 law is evolving to recognise this modern conception of 'private life'. Therefore, the notion of private life can no longer be assimilated to 'not in the public interest'.

⁶³ Auvret (n 38), 358.

⁶⁴ Yves Mayaud, *Le Mensonge en Droit Pénal* (L'Hermès 1997), 219.

⁶⁵ Beignier *et al* (n 3), 787.

⁶⁶ On the decline of the practice of duels, see Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IVA.

⁶⁷ See, for instance: Yves Mayaud, 'L'Exception de Vérité Désormais Ouverte aux Faits de Plus de 10 Ans' (2011) 2011(2) RSC 401.

The consequence of this incremental change in the definition of ‘private life’ is that the availability of the defence of truth is no longer conditional on the publication’s social utility. Thus, despite the remaining exception in article 35, *alinéa* 3 a) the right to prove the truth of the defamatory statement to escape liability must therefore be seen as the principle rather than the exception. The consequence is that the law is largely returning to the regulation of calumny, in other words, of false statements.⁶⁸

2. A change of perspective: moving away from breaches of the public peace

It has thus been shown through recent developments that defamation law has moved away from its original disregard for the truth or falsity of the statement. A related consequence of these developments is a change of perspective. Less emphasis is placed on the risk of breach of the public peace. It is not clear, however, what the emphasis has shifted towards.

According to Mayaud, the inversion of the paradigm in relation to truth in the 1944 ordinance means that the focus has shifted from the wrong committed against an individual towards a quest for truth. From this quest emerges a ‘right to know’,⁶⁹ labelled as such in the context of defamation claims by the *Cour de cassation* in its 2010 annual report.⁷⁰

While this argument is compelling, Mayaud does not positively identify a shift away from the focus on the wrong committed against a private individual. He simply deduces it from the acceptance that inasmuch as the statement was true

⁶⁸ Mayaud does, in fact, highlight that the law has gradually returned to the regulation of calumny, thus making falsity a constituent element of the wrong. See Mayaud, ‘L’Exception de Vérité Désormais Ouverte aux Faits de Plus de 10 Ans’ (n 67). Here we note a discrepancy in Mayaud’s conceptualisation of the truth defence: in 1997 he still saw it as an exception (*Le Mensonge en Droit Pénal* (n 64), 219); in ‘L’Exception de Vérité Désormais Ouverte aux Faits de Plus de 10 Ans’ (n 67), in which he comments on the *Conseil constitutionnel*’s 2011 decision (Cons const, 20 May 2011, n 41), he accepts the defence of truth as a principle, but does not explain the change in his view. In all likelihood this accounts for the gradual change in the 1881-specific conceptualisation of ‘private life’ predicted by Beignier *et al* (n 3), 787.

⁶⁹ Mayaud, ‘L’exception de vérité désormais ouverte aux faits de plus de 10 ans’ (n 67).

⁷⁰ *Rapport Annuel* de la Cour de cassation 2010, *Le Droit de Savoir*; specifically in the context of the truth defence in the law of defamation, see 282.

the defendant will not be liable for having caused the damage. Building on this remark, another interpretation may be proposed. Since it is not possible to positively identify a shift away from the wrong committed against a private individual, it is arguable that there has in fact been no such shift. Instead, the change of focus relates to the justifications for protecting reputation. Owing to societal changes, breaches of the public peace are no longer a threat. Therefore, the law of defamation no longer protects the claimant's reputation because of the potential public disorder that any interference might cause. It has come to protect the claimant's reputation because of the intrinsic value of reputation for the individual.

Seen through this new lens, the French wrong of defamation acquires a distinctly private (tortious) character. We have seen above that contrary to criminal defamation, in the tortious wrong the interest in protecting reputation may give way to the public interest in exposing the truth. So the increase in the scope of the truth defence is not due to the existence of a 'quest for truth' but rather to the privatisation of the criminal wrong of defamation. In that sense, there is a clear convergence of the French law of defamation towards the English model.

3. The broken link between the nature of the regulation and the substance of the rules

Duff argues that crimes are public in the sense that they are the proper concern of the public and are dealt with by a public institution: the criminal justice system. Their publicness might be either a cause or a consequence of the criminalisation.⁷¹ In the former situation, the wrong has consequences for the public as a whole, which warrant criminalisation. In the latter situation, the wrong is criminalised for reasons other than the consequences it has on the public as a whole. It therefore acquires a public character for the sole reason that it is dealt with by the criminal justice system.

⁷¹ RA Duff and Stuart Green, 'Introduction: The Special Part and its Problems' in RA Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005), 8.

Originally, the publicness of the French wrong of defamation was a cause of its criminalisation. Following the legal developments traced above, the French wrong's public character has become consequential to the fact that it falls with the area of criminal law. And so in that sense, although the wrong is still criminal in nature, it has acquired a distinctly private character in that its purpose is to settle a dispute between two individuals. Yet the Guinchard Commission's proposition to decriminalise the wrong in 2008,⁷² which would have reflected the change in the focus of the protection, failed. As a consequence, the original link existing between the nature of the regulation (tortious and criminal) and the substantive content of the rules is broken.

C. Denying the link between distinct contents of proof and the nature of the regulation

One objection, based on the content of the English and French evidentiary rules, could be advanced to disprove the break between the regulatory features and the content of the rules. It is that English law only requires that *substantial* truth be proven whereas French law requires that the *exact* truth be proven. For an English lawyer, this distinction might appear to echo the distinction between the civil and criminal evidentiary standards. However, contrary to this suggestion, this difference relates to the content of what has to be proved rather than to the standard to which truth has to be proved. It must be rationalised on the basis of the scope of the wrong, rather than the nature of the regulation. Thus, the modern rules on truth are fully disconnected from each jurisdiction's regulatory features.

1. Evidentiary standards and the nature of the regulation

At first sight, the difference in the general civil and criminal standards of proof seems to be reflected in the English and French defamation laws' requirement as to what has to be proved true. The criminal law standard, proof beyond

⁷² Commission sur la répartition des contentieux présidée par Serge Guinchard, *L'Ambition Raisonnée d'une Justice Apaisée* (La documentation française: Rapports officiels 2008), 290ff.

reasonable doubt,⁷³ has been described as ‘a doubt which would cause the jury to hesitate or pause before taking a decision in their own affairs’.⁷⁴ This evidentiary standard is necessary to overcome the presumption of innocence.⁷⁵ By contrast, the civil law standard of proof on the balance of probabilities⁷⁶ is a lower standard of proof: it only requires that the claimant prove that there is more than a 50% likelihood that the defendant’s breach of duty caused the harm.

The requirements as to what has to be proved true in English and French laws of defamation seemingly echo this distinction. In the English law of defamation, which gives rise to civil liability, ‘the general rule is that the defendant must prove the truth of the defamatory sting of the publication but he need not prove the literal truth of every fact which he has stated. It is enough if he prove the substantial truth of every material fact.’⁷⁷ Thus, in *Rothschild* the defendant newspaper successfully escaped liability by proving that the disputed statement, alleging that the banker claimant had brought the European Commissioner for Trade’s reputation into dispute, was substantially true.⁷⁸ By contrast, in the French law of defamation, which gives rise to criminal liability, the standard is much stricter. The *Cour de cassation* requires that proof be perfect.⁷⁹ In practice, this means that proof must relate to the disputed statement and be ‘complete’:⁸⁰ the defendant must prove every fact which he has stated. Substantial truth is not sufficient to justify; thus, the French requirements as to what has to be proved true are more stringent than the English ones. At first sight, a link may be drawn between the civil and criminal standards of proof, and the requirements as to what has to be proved true in the English and French laws of defamation. The English standard of substantial truth appears to echo the less stringent civil

⁷³ *Mackenzie (Gavin) v HM Advocate* [1960] Crim LR 273.

⁷⁴ Gerald H Gordon and Christopher H W Gane, *Renton and Brown on Criminal Procedure* (6th edn, Sweet & Maxwell 2014), 24-01.

⁷⁵ *Ibid.*

⁷⁶ Jones *et al* (n 26), Chapter 2, Section 1.

⁷⁷ *Ibid.*, 22-79.

⁷⁸ *Rothschild v Associated Newspapers Ltd* [2012] EWHC 177, [2012] All ER (D) 104, approved on appeal. Tugendhat J noted that ‘a defendant who is sued for libel has a complete defence if he can prove that the words complained of are substantially true’ (at [15]).

⁷⁹ Michel Véron, ‘Le Cumul des Moyens de Défense’ (2007) 2007(7) Dr pén comm. 97: ‘une preuve complète, parfaite et corrélative aux imputations ou aux allégations’.

⁸⁰ Cass crim, 14 April 1992, Bull crim 1992, n°162: ‘que le prévenu ne rapportait pas la preuve totale de la vérité des faits par lui allégués’.

balance of probabilities standards, and the French standard of complete truth could be seen as applying the more stringent criminal standard of proof beyond reasonable doubt.

Contrary to this suggestion, the more or less stringent requirements as to what has to be proved true in England and France cannot be rationalised on the basis of each jurisdiction's regulatory features and of the distinct civil and criminal evidentiary standards. Despite the appearances described above, in practice there can be no link between the civil and criminal standards of proof and the requirements as to what has to be proved true in English and French laws of defamation because the distinction between civil and criminal evidentiary standards is unknown in French law. Indeed,

‘Unlike common law, continental European civil law does not generally distinguish between standards of proof for civil and criminal matters. Standard of proof is always the (full) conviction of the judge, a *conviction intime* (reasoned conviction)’.⁸¹

This means that in France, regardless of whether the claim is civil or criminal, there is no difference in the standard of proof to which truth has to be proved. Rationalising the stricter French requirements as to what has to be proved true on the basis of the criminal nature of the French wrong of defamation is therefore mistaken.

In fact, two separate issues must be distinguished: the evidentiary standards and the evidentiary contents. Evidentiary standards only dictate the level of certainty and the degree of evidence necessary to establish proof (on the balance of probabilities or beyond reasonable doubt). They do not dictate the content of what has to be proved true (or in other words, the substance of the evidence of truth: substantial or complete truth). More content does not necessarily command a higher degree of evidence or level of certainty. For instance, English law could

⁸¹ Mark Schweizer, ‘The Civil Standard of Proof – What Is It, Actually?’ (2013) 2013/12 MPI Collective Goods Preprint 1, 4; TR Lee, ‘Pleading and Proof: The Economics of Legal Burdens’ (1997) *BYU L Rev* 1, 25.

require proof of complete (rather than substantial) truth without shifting the current balance of probabilities standard to that of proof beyond reasonable doubt.

2. Evidentiary contents and the scope of the wrong

In the previous sub-section, I have denied the existence of a link between the distinct English and French requirements as to what has to be proved true and the nature of the regulation. In doing so, I refocused the debate on the evidentiary contents rather than on the evidentiary standards. I now provide a positive explanation for the existence of different requirements as to what has to be proved true, based on the different scope of the English and the French wrongs of defamation.

The scope of a wrong influences the evidentiary contents required to successfully avail a defence. Where the scope of the wrong is wide, a given conduct is more likely to be considered wrongful. This justifies that the scope of the defence be correlatively wider, and that the rules relating to the content of what has to be proved be more lenient.

It is undeniable that the English and the French wrongs of defamation have considerably different scopes. In broad terms, in both England and France liability arises for the publication of a statement referring to the claimant, carrying a defamatory meaning and that has caused or is likely to cause serious harm. However, the understanding of what qualifies as defamatory for the purposes of the English and French laws of defamation differs. While in both systems, the test embodies a societal norm against which the nature of the statement is judged,⁸² the French one has an additional requirement. According to the *Cour de cassation*, a statement cannot qualify as defamatory unless it consists in a sufficiently precise allegation of facts that can easily be proven and

⁸² See above, Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIIB1 and IVB1.

be the object of a contradictory debate.⁸³ Where the facts are not sufficiently precise to be proven, for instance when they are too general, the allegation does not qualify as defamatory. Liability for speech that falls short of the definition of defamation for the purposes of the law of 29 July 1881 arises under different causes of action, such as *injures*.⁸⁴ The scope of the French wrong of defamation is therefore much narrower than the English one. Speech that would qualify as defamatory in England may not be characterised as such in France.

The English and French rules relating to the content of what has to be proved echo this distinction in scope. The English wrong, which is wider in scope, has a more lenient requirement of substantial proof; the French wrong, which is narrower in scope, has a more exacting standard of complete and perfect proof.

These observations support the view that the scope of the wrong and the content of what has to be proved true are interrelated. The asymmetry between the French and English standards is not a symptom of incompatible approaches to truth. The French rule is not less favourable to the defendant. The narrower definition of the wrong implies that there are fewer instances in which a publication will fall within the scope of the law of defamation. When the publication does qualify as defamatory, the disputed statement is by its very nature precise enough to be proven; the requirement that proof be exact rather than substantial therefore does not unduly complicate the defendant's evidentiary burden.⁸⁵

⁸³ See above, Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IVA.

⁸⁴ Ibid.

⁸⁵ Note, however, that while the French law of defamation requires that the contested allegation be sufficiently precise to be proven, the courts will be satisfied with a low degree of precision. As such, the *Cour de cassation* accepts that both innuendos and offensive expressions can satisfy the requirement of precision (Cass crim, 23 November 1993, Bull crim 1993, n°350; Cass crim, 14 April 1992, Bull crim 1992, n°162). This is surprising insofar as 'offensive expressions' are theoretically too imprecise for speech to be characterised as 'defamatory'. They are, in fact, a constituent element of another cause of action under which liability for speech can arise: *injures* (injurious words), which are defined in art. 29, *alinéa* 2 of the law of 29 July 1881. Thus, it would appear that the understanding of what counts as defamatory speech is somewhat flexible. The question becomes whether or not the offensive expression is a 'disguise' for the imputation of a sufficiently precise fact (Beignier *et al* (n 3), 445). Nevertheless, although disputed allegations may feature a variable degree of precision in the allegation of fact, the evidentiary standard does not change. The complete and absolute truth must be proven, even when the

To conclude, when one examines the relationship between the nature of the regulation and the rules on truth, it is clear that the original link no longer exists. Over the past decades, French law has adopted a new perspective, similar to that of its English counterpart. Despite the fact that in France defamation is a criminal wrong, it has adopted the civil goal of protecting reputation subject to a defence of truth, thereby relinquishing the criminal goal of preventing breaches of the peace and signalling a distinct privatisation of the wrong. Further, the different evidentiary standards are best rationalised on the basis of the scope of the wrong, rather than on that of the nature of the regulation. This leads to the inevitable conclusion that the rules on truth are now fully disconnected from the nature of the regulation.

IV. The emergence of a shared approach to truth

In the previous section a negative thesis has been advanced by denying the existence of a link between the nature of the regulation and the content of the modern rules. In this section, I build on other authors' works to positively identify a similar doctrine of truth in the English and French laws of defamation. In both systems the preferred approach is to treat truth as a defence, and the disputed statement's falsity is presumed; this signals the existence of a shared underlying value system. Further, in both jurisdictions the exceptions to the permissibility of the truth defence protect the individual's privacy in pursuance of the public interest in social cohesion. These elements of similarity are indicative of the existence of a shared approach to the defence of truth in England and France.

disputed publication does not fully meet the originally stringent standard of precision. In this specific case of figure, it may be that the stringent evidentiary standard will put a French defendant at a disadvantage as compared to an English one.

A. Defence of truth and presumption of falsity: a similar balancing of conflicting rights

In both England and France, the categorisation of truth as a defence results in a specific allocation of the burden of proof: the onus is on the defendant to prove the truth of the statement, rather than on the claimant to prove its falsity. This reveals a similar balancing of the conflicting rights to reputation and to freedom of expression, which in turn illustrates the existence of a shared underlying value system. I start by establishing the fact that truth is categorised as a defence in both jurisdictions. I then consider the conceptual implications of this categorisation.

1. The categorisation of truth as a defence

A fundamental element of similarity in the English and the French conceptions of truth is that they both categorise truth as a defence, rather than choosing to treat falsity as a definitional element of the wrong.

It is generally accepted that torts are private civil wrongs, characterised by a breach of duty. In the absence of such a breach, there can be no wrong.⁸⁶ From this perspective, the terminology of ‘damage’ in tort law is deceptive. It conceals the fundamental difference that exists between *iniuria* and *damnum*, i.e. between ‘injury and harm, a civil wrong and its consequences, rights and loss’.⁸⁷ Although *iniuria* virtually always brings about *damnum*,⁸⁸ there is no logical connection between both. There can be *iniuria* without *damnum*,⁸⁹ and conversely *damnum* without *iniuria*. However, the *iniuria* represents the wrong grounding tortious liability:⁹⁰ it is therefore essential to bring a claim.

⁸⁶ Peter Birks, ‘The Concept of a Civil Wrong’ in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1995), 33, 37.

⁸⁷ Robert Stevens, ‘Rights and Other Things’ in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Pub 2012), 2.

⁸⁸ As Stevens notes, this is especially true in the context of personal injury claims.

⁸⁹ Stevens (n 87), 5: ‘Some wrongs, unlike breaking legs, do not leave the defendant factually worse off compared to their starting position, such as the giving of a blood transfusion to a Jehovah’s witness contrary to their wishes.’

⁹⁰ Ibid, 4.

In line with this explicative theory, there are two dominant ways of analysing the role of truth in the English law of defamation. On the first view, the law of defamation only protects *deserved* reputation. The core element of this explicative theory is based on the claimant's own misconduct, which makes the exemption of liability an instance of *damnum absque iniuria*. While harm to reputation (*damnum*) is characterised, its wrongful character (*iniuria*) is not. This is because the infliction of the harm is, in a sense, justified by the defendant's past misconduct. This view is best explained in the words of Street ACJ (as he was then) in the Australian case of *Rofe v Smith's Newspapers Ltd*:⁹¹ '[A]s the object of civil proceedings is to clear the character of the claimant, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it.'⁹² This is the interpretation that is favoured by the case law.⁹³

On the second view, defamation is an attack to the claimant's reputation (whether or not it is deserved) but the truth of the statement provides a good

⁹¹ (1924) 25 SR(NSW) 4.

⁹² *Ibid*, 21-22.

⁹³ *Silkin v Beaverbrook* [1958] 2 All ER 516, [1958] 1 WLR 743, 745 (per Lord Diplock): 'the law has maintained a balance between, on the one hand, the right of the individual ... to his unsullied reputation if he deserves it, and on the other hand, ... the right of the public... to express their views honestly and fearlessly'. Generally there is a line of cases which approve the principle laid down in *M'Pherson v Daniels* (n 6), 451: 'the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess.' See, most recently: *Rothschild v Associated Newspapers Ltd* (n 78), [39]; *King v Grondon* [2012] EWHC 2719, [2012] All ER (D) 96, [32]-[33]; *Hamaizia v Commissioner of Police for the Metropolis* [2013] EWHC 848, [2013] All ER (D) 253, [19]. That this is the position of the English courts is recognised by Parkes *et al* (n 12), 11.1. Note that Descheemaeker also used to support this view: Descheemaeker, 'Veritas non est defamatio' (n 2), 16; Eric Descheemaeker, 'A Man of Bad Character Has Not So Much To Lose': Truth As a Defence in the South African Law of Defamation' (2011) 128 SALJ 452, 461. He recently changed his view: see Eric Descheemaeker, 'Mapping Defamation Defences' (2015) 78 MLR 641, 651-52. Also see, supporting the idea that defamation only protects deserved reputations: James Goudkamp, *Tort Law Defences* (Hart Pub 2013), 480: 'Recall that damage is an element of defamation. If the defendant's statement is true, the claimant will not have suffered any damage. This is because a claimant who merely has his reputation reduced to its proper level is not injured in the eyes of the law. This situation is readily understandable. The law is not concerned with protecting undeservedly high reputations. It follows that the plea of truth is an absent element defence that negates the damage element of defamation.'

defence for committing the wrong. Thus, both *damnum* and *iniuria* are characterised, but the *iniuria* is committed *iure*.⁹⁴

A third possible interpretation, which stands halfway between the other two, is that defamatoriness and truth are mutually exclusive. So although *damnum* is characterised, *iniuria* is not because falsity is a necessary element to characterise defamatoriness. Truth is then analysed as an ‘absent element’ defence.⁹⁵ The defendant’s assertion of truth is, in fact, the denial of a constituent element of the wrong: falsity.

In my view, the first and the last approaches are disputable: the first because it misunderstands the concept of reputation, and the last because it reveals a circular reasoning. I therefore endorse the second interpretation.

I start with a criticism of the first approach: namely, the one that holds that no injury is done when speaking true words because defamation only protects deserved reputation, or in other words reputation founded in character. Reputation was defined by Lord Denning MR as ‘what other people think [the plaintiff] is’, whereas his character is ‘what [the plaintiff] in fact is’.⁹⁶ Thus, reputation designates the esteem in which others hold the claimant, whether or not that esteem is deserved. Conceptually, it is therefore wrong to say that the law of defamation does not protect undeserved reputations.⁹⁷ It must nevertheless be recognised that this is the practice of the courts, and it is probably grounded in an idea of producing what is perceived to be a ‘just’ outcome: using the defamation trial as an occasion to realign reputation with character.

I now turn to discuss the second approach (according to which when speaking true defamatory words about the claimant an injury is done, but truth excuses it)

⁹⁴ In this sense: Descheemaeker, ‘Mapping Defamation Defences’ (n 93); Tugendhat and Christie (n 49), 7.33-.34.

⁹⁵ See, defining absent element defences: Goudkamp (n 93), 466-67.

⁹⁶ *Plato Films Ltd v Speidel* [1961] AC 1090, [1961] 1 All ER 876, 1138.

⁹⁷ Descheemaeker has also pointed out that it is just not true: ‘the existence of even one exception to the rule – the Rehabilitation of Offenders Act – makes it impossible to say that English law *never* protects underserved reputation in the law of defamation’. See Descheemaeker, ‘Mapping Defamation Defences’ (n 93), 651-52.

and the third one (according to which when speaking true defamatory words about the claimant no injury is done). Under both views, it can be said that so far as civil proceedings are concerned a defendant will not be liable for having caused the damage in cases where the statement was true. The determination of the correct view then depends on the reason for which the defendant is not held liable. Is it because he has a valid defence (as asserted by the second view), or is it because no wrong was committed in the first place (as asserted by the third view)? Ultimately, this question turns to the role of truth in the law of defamation, and relatedly to the definition of defamatoriness. One must query whether truth is a defence to the wrong of defamation, or whether untruth is part of its definition.⁹⁸ The answer to this question will determine whether one considers that a wrong has been done but is justified or excused; or that no wrong has been done.

There is no universally accepted answer, and different views are expressed in the case law⁹⁹ and in the scholarship.¹⁰⁰ Nevertheless, a major problem with the third view (according to which a statement cannot be defamatory unless it is false) is that it is grounded in circular reasoning. It only considers falsity as a definitional element of the wrong because it is presumed, rather than positively proving that it is a constituent element of the wrong. It thus fails to positively disprove the labelling of truth as a defence. Therefore, the second view – that truth is properly speaking a defence – appears to be the most convincing interpretation.

⁹⁸ This question was formulated in Eric Descheemaeker, 'Tort Law Defences: A Defence of Conventionalism' (2014) 77 MLR 493, 502.

⁹⁹ A line of cases supports the third view: *Scott v Sampson* (1882) 8 QBD 491, 503: 'the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit'; *Youssouf* (n 49), 584: 'a false statement about a man to his discredit'. But there is an equally important number of cases which do not mention falsity as a definitional element of the wrong: *Sim v Stretch* [1936] 52 TLR 669, [1936] 2 All ER 1237, 671: the test was whether the words would tend to lower the claimant in the estimation of right-thinking members of society generally; *Berkoff v Burchill* [1996] 4 All ER 1008, [1997] EMLR 139, 152: defamation was defined as an attack on reputation, that is on a man's standing in the world.

¹⁰⁰ Descheemaeker defends the second approach, but Birks defended the third: Descheemaeker, 'Tort Law Defences' (n 98), 502. The second approach is also favoured by Parkes *et al* (n 12), 2.1; Blackstone and more recently Phillipson prefer the third: Sir William Blackstone, *Commentaries on the Laws of England* (Project Gutenberg 2009), 123, 125-26; Gavin Phillipson, 'The "Global Pariah", the Defamation Bill and the Human Rights Act' (2012) 63 NILQ 149, 153.

We have established that in England, truth is a defence (rather than falsity being a definitional element of the wrong). This is equally true in France. The enquiry is similar to that in English law, except that the terminology changes: we do not speak of *damnum* and *iniuria*, but of justification defences and excuse defences.¹⁰¹

Whereas a justification defence is a determination that the defendant's conduct was not criminally wrongful,¹⁰² an excuse defence is a determination that the defendant is not criminally blameworthy for having engaged in what was, none the less, criminally wrongful conduct.^{103,104} If truth is a justification defence, it follows that the wrong was not characterised; falsity is therefore a constituent element of the wrong. If, on the other hand, truth is considered an excuse defence, it follows that the wrong was characterised, but that the defendant is exempted from punishment; consequently, falsity is not a constituent element of the wrong.

That truth is an excuse defence is clear when considering the historical development of the defence.¹⁰⁵ Originally, the *prima facie* cause of action in defamation was indifferent to the truth or falsity of the statement. Therefore, the (then) limited *exceptio veritatis* clearly acted as an excuse defence: it merely prevented a finding of criminal liability despite the defendant's wrongful conduct. The reason for which the law recognised a limited truth defence was based on the idea that some statements should be publishable because of their social utility – or in other words, because it was in the public interest that this information be known. I noted above that the 1944 ordinance merely inverted the pre-existing paradigm of the *exceptio veritatis*.¹⁰⁶ Whereas before 1944 publications were presumed not to be in the public interest, following the

¹⁰¹ See: Auvret (n 38), 297.

¹⁰² Jonathan Law and Elizabeth A Martin (eds), *A Dictionary of Law* (7th edn, OUP 2009), 'Justification'.

¹⁰³ Ibid, 'Excuse'.

¹⁰⁴ On justifications and excuses generally, see: Roger Merle and André Vitu, *Traité de Droit Criminel*, vol 1 (7th edn, Cujas 1997), 431; Patrick Maistre du Chambon and Philippe Conte, *Droit Pénal Général* (6th edn, Armand Colin 2002), 240; Bernard Bouloc, *Droit Pénal Général* (23rd edn, Dalloz 2013), 399.

¹⁰⁵ Contra: Levasseur (n 35), 128.

¹⁰⁶ See above, IIIB1.

enactment of the ordinance the presumption became that the disputed publication pursues some sort of social utility. Consequently, a logical inference can be drawn. It is that the inversion of the paradigm of the *exceptio veritatis* has not introduced any change in the spirit of the defence. Therefore, the *exceptio veritatis* remains an excuse defence, as was the case in the original law on the press. This analysis is supported by the courts' view that where the truth of the statement is established, the *actus reus* of the wrong (the publication of a defamatory statement) is nonetheless characterised.¹⁰⁷ Clearly, this approach does not accommodate falsity as a definitional element of the wrong.

2. Allocating the burden of proof: a similar balancing of conflicting rights

The defence of truth is designed to defeat the presumption of falsity that exists in both English and French law. The effect of this presumption is that, once the claimant has proven that a defamatory statement designating him has been published, a presumption arises that the statement is false. It is then the defendant who bears the burden of proving that the statement was true. This illustrates the fact that England and France have balanced the conflicting rights to reputation and freedom of expression in a similar fashion, revealing a similar conceptual approach to the role of truth.

The categorisation of truth as a defence in both jurisdictions may be explained by the existence of a similar system of domestic values. In England, under section 3(1) of the Human Rights Act 1998 legislation must be read and given effect so far as possible in a way which is compatible with the rights contained in the ECHR. This has led one author to argue that we are witnessing a positive 'Europeanisation' of English tort law.¹⁰⁸ Indeed, in recent years the right to reputation has been drawn within the scope of the article 8 ECHR right to private life. This is affirmed both in the European Court of Human Rights and in domestic courts.¹⁰⁹ The result is that the article 10 ECHR right to freedom of

¹⁰⁷ Cass crim, 1 March 2005, Bull crim 2005, n°72.

¹⁰⁸ See: Paula Giliker, *The Europeanisation of English Tort Law* (Hart Pub 2014).

¹⁰⁹ Notable Strasbourg cases are: *Chauvy v France* (2005) 40 EHRR 610, [70]; *Radio France v France* (2005) 40 EHRR 29, [31]; *Cumpăna v Romania* (2005) 41 EHRR 20; *Pfeifer v Austria*

expression is no longer the ‘starting point’, with reputation constituting a legitimate restriction.¹¹⁰ Articles 8 and 10 of the ECHR are given equal value and must be balanced against one another.¹¹¹ This is equally true in France, where recent cases have referred directly to Convention rights, bypassing the provisions of the law on the press.¹¹²

The process of balancing the right to reputation against that to freedom of expression therefore results in an ordering of priorities. This order represents a value system in which different kinds of moral harm, broadly understood as the harm caused by the injustice of an unjust outcome, are weighed differently.¹¹³ Significantly, due to the existence of different value systems (and therefore of a different ordering of priorities) the balancing process may produce distinct outcomes in different jurisdictions. For instance, although at common law there still exists a presumption of falsity in the USA, the First Amendment has had significant consequences on the constitutional law of defamation. Since the landmark case of *Sullivan*, the claimant must positively prove that the publication was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’¹¹⁴ While this rule originally only

(2007) 48 EHRR 175, [33], [35]; *White v Sweden* (2008) 46 EHRR 3; *Lindon, Otchakovsky-Laurens and July v France* (2008) EHRR 35; *Karakó v Hungary* (2011) 52 EHRR 36; *Springer AG v Germany* (2012) 55 EHRR 6. This approach is recognised and followed in English courts: *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, [37]-[42]; *Re Attorney-General's Reference No.3 of 1999* [2009] UKHL 34, [2010] 1 AC 145; *Clift v Slough Borough Council* [2009] EWHC 1550, [2009] 4 All ER 756; *Flood v Times Newspapers Ltd* [2009] EWHC 2375; *Brady v Norman* [2010] EWHC 1215, [2010] All ER (D) 269; *Ronaldo v Telegraph Media Group Ltd* [2010] EWHC 2710, [2010] All ER (D) 71.

¹¹⁰ This approach is exemplified in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, [1999] 4 All ER 609, 201.

¹¹¹ Guidance regarding this ‘new methodology’ can be found in: *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; and *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, [17]. See below, IIIB3.

¹¹² See Chapter 2: The framework of defamation liability in comparative historical perspective, IIB4. The cases only refer to art. 10 ECHR, however it is clearly accepted that the right to reputation now falls within the scope of art. 8 ECHR. See: Jean-Pierre Marguénaud, *JCL. Communication*, Fasc. n°12, 2015, 96-98.

¹¹³ Ronald Dworkin, *A Matter of Principle* (OUP 1985), 80.

¹¹⁴ *New York Times v Sullivan* 376 US 254 (1964), 280. Note however that the American law of defamation is extremely complex, and the allocation of the burden of proof depends on three variables: the nature of speech, the claimant’s and the defendant’s status. For a thorough analysis of this issue, see: Stephanie Leiter, ‘Comments on *Philadelphia Newspapers Inc v Hepps*’ (1986) 18 Rutgers L J 687.

applied to public officials,¹¹⁵ it has been extended to public figures, and later to private defendants suing in relation to public speech.¹¹⁶

Thus, the fact that both England and France share a presumption of falsity reveals that they share a similar value system. This is best described in Dworkin's words:

‘[W]hen the burden of proving truth is placed on the defendant in a defamation suit ... after the claimant has proved defamation, this may represent some collective determination that it is a greater moral harm to suffer an uncompensated and false libel than to be held in damages for a libel that is in fact true.’¹¹⁷

B. *Replicationes*: privacy, social cohesion and the rights context

Section 8(5) of the Rehabilitation of Offenders Act (ROA) and article 35, *alinéa* 3, a) of the 1881 law constitute, in Descheemaeker's Latin terminology, *replicationes*.¹¹⁸ These are essentially ‘defences to defences’, ‘whereby the onus shifts back to the claimant to prove a further set of facts... in order to dislodge a *prima facie* defence open to his adversary... and thereby reinstate the original finding of liability.’¹¹⁹

In the same way that the existence of a presumption of falsity reveals a shared underlying value system in England and France, these *replicationes* are grounded in similar policy principles. In this section, I consider the English and the French exceptions to the truth defence and establish that they protect the individual's right to privacy as a means to promote the goal of social cohesion. I argue that their classification in the law of defamation is not conceptually misguided, and note that the rights context and the new methodology it introduced – the ‘ultimate balancing test’ – may in fact render this discussion irrelevant.

¹¹⁵ *Curtis Publishing Co v Butts* 388 US 130 (1967).

¹¹⁶ *Philadelphia Newspapers Inc v Hepps* 475 US 767 (1986).

¹¹⁷ Dworkin, *A Matter of Principle* (n 113), 89.

¹¹⁸ Descheemaeker, ‘Mapping Defamation Defences’ (n 93), 644.

¹¹⁹ *Ibid.*

1. The English limitation: malicious disclosure of spent convictions

In England, there exists one limit to the principle that truth is a complete defence to defamation liability. Section 8(5) ROA precludes reliance on the truth defence when the disclosure of a spent conviction is actuated by malice.

As its name indicates, the purpose of the ROA is to facilitate the rehabilitation of convicted offenders. Its effect is that once the rehabilitation period has elapsed, the person is treated as if he had not committed, been charged with, prosecuted for, convicted of or sentenced for the relevant offence(s). There is no clear policy underlying the Act: the competing interests are non-disclosure of spent convictions and the right to tell the truth.¹²⁰ But a generally accepted view is that the ROA prevents invasions of privacy.¹²¹ It embodies what the French have labelled a right to be forgotten,¹²² which is a specific instance of the more general right to privacy established by article 9 of the Civil code. Indeed, by preventing undue publicity for atoned offences, the ROA effectively protects the offender's private life. Descheemaeker has recognised this and argued that section 8(5) has 'nothing to do with reputation and therefore, if one accepts the... equiparation [that the law of defamation protects reputation]..., nothing to do with the law of defamation.'¹²³ Thus, in his view, it should be repealed.

However, this view can be contested on three different grounds: by arguing that privacy is only protected as a secondary interest, that section 8(5) must not be read as encroaching upon the scope of the tort of misuse of private information, and that it is fact pursuing a goal that characterises the law of defamation.

¹²⁰ In this sense, see Parkes *et al* (n 12), 18.17, specifically fn 77.

¹²¹ See, for instance: Gerald Dworkin, 'Rehabilitation of Offenders Act 1974' (1975) 38 MLR 429, 429; Eady J, Speech delivered at City University (London, 11 March 2010), available at <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/eady-j-city-university-10032010.pdf>, 9; Descheemaeker, 'Veritas Non Est Defamatio' (n 2), 16-17.

¹²² François Lyn, 'L'Exceptio Veritatis des Imputations Diffamatoires: Regards Croisés des Droits Français et Européen' (2008) 2008(66) Gaz Pal 2.

¹²³ Descheemaeker, 'Veritas Non Est Defamatio' (n 2), 17.

The view that section 8(5) wrongly protects privacy interests can be opposed on the basis of the distinction between ‘primary’ and ‘secondary’ interests endorsed in Chapter 1.¹²⁴ It was seen in Chapter 1 that one cause of action may protect a wide range of interests. However, not all these interests are protected in a ‘right-constituting’ way as a primary interest. Some are protected as secondary interests, meaning that their protection is only consequential to some other right violation. In relation to section 8(5), Descheemaeker’s argument seems to assume that privacy is protected by the law of defamation as a primary interest, or in other words, in a right-constituting way. While it is not formulated as such, this interpretation follows from the fact he himself has accepted that the tort of defamation protects not only the (primary) interest in reputation but also other (secondary) interests that are consequential to the injury to reputation.¹²⁵ He does not object to the protection of these secondary interests under the tort of defamation. Thus, the reason for which he calls for section 8(5) to be repealed must be that he sees it as protecting privacy in a right-constituting way and that this is inappropriate in the law of defamation, in which the only interest protected in a right-constituting way should be reputation.

The view that privacy is protected in section 8(5) ROA in a right-constituting way can be opposed. Indeed, there is nothing to suggest that the protection of privacy interests by section 8(5) differs from that afforded to other interests that are consequential to the injury to reputation. In fact, Descheemaeker notes that the list ‘need not be closed and might be extended by courts as new cases are brought.’¹²⁶ My interpretation is that the protection of privacy through the mechanism of section 8(5) ROA merely adds to this list.

This argument is strengthened by the fact that although section 8(5) ROA affords an oblique protection to privacy rights, it does not in itself establish any right to

¹²⁴ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIIA.

¹²⁵ Eric Descheemaeker, ‘Protecting Reputation: Defamation and Negligence’ (2009) 29 OJLS 603, 616.

¹²⁶ Ibid.

confidentiality in respect of spent convictions. In *KJO v XIM*,¹²⁷ Eady J commented on this suggestion and noted that:

‘Obviously, no such claim was envisaged by the legislature at the time of the 1974 enactment. The limited protection it afforded, although undoubtedly intended to facilitate the desirable public policy objective of rehabilitation, consisted of certain carefully defined rights or privileges.’¹²⁸

Consequently, he refused to extend the scope of the tort misuse of private information to cover the revelation of past criminal convictions on the basis of the policy underlying the ROA. To do so:

‘[W]ould require clear authority, either in Strasbourg or domestic jurisprudence, to justify using the policy behind the Act to extend the legal remedies available beyond those that Parliament specifically provided. Ordinarily, a judgment as to whether there is a “reasonable expectation of privacy” in respect of a particular piece of information will have to be made according to the standards of ordinary reasonable onlookers. Here, on the other hand, the only context relied upon is the statutory regime. Where that is so, it is difficult to judge “reasonable expectations” other than from the wording sanctioned by Parliament or, perhaps, with any available guidance from Strasbourg jurisprudence on the significance of historic convictions.’¹²⁹

So, there exist conceptual discrepancies between section 8(5) of the ROA and the tort of misuse of private information. The former should not be seen as a subset of the latter; thus, section 8(5) cannot be interpreted as an encroachment of the tort of misuse of private information on the scope of the tort of defamation.

What is more, the limited protection granted through section 8(5) of the ROA is established in pursuance of the same policy that irradiates all of defamation law:

¹²⁷ *KJO v XIM* [2011] EWHC 1768, [2011] All ER (D) 65.

¹²⁸ *Ibid*, [9].

¹²⁹ *Ibid*, [16].

the promotion of social cohesion.¹³⁰ McNamara defined reputation as:

‘[A] social judgment of a person based upon facts which are considered relevant by a community. It concerns the evaluation of a person in a community. An evaluation of a person’s reputation by a community always rests upon some sense of who is – and who is not – a part of the community.’¹³¹

In other words, his theory rests on an interpretation of reputation as a factor of inclusion in, or exclusion from, a community. The test of defamatoriness relies on a conceptualisation of what constitutes the said community, grounded in moral judgments of the community’s members.¹³² On this view, the law of defamation recognises an overarching public interest in social cohesion, which is furthered through one of the dominant modes of protecting reputation: the vindication of the claimant’s good name. This has implications for the permissibility of the truth defence. Indeed, there may be instances in which this public interest in social cohesion qualifies the importance of the notion of truth.

If we understand the process of rehabilitation as one that is undertaken with the goal of reintegrating the offender into society,¹³³ section 8(5) of the ROA therefore protects the individual’s privacy *as a means* to promote the public interest in social cohesion. The protection that is afforded to privacy interests ultimately seeks to further the law of defamation’s own goals.

2. The French private life exception

The concern to promote social cohesion is also present in article 35, *alinéa* 3 a) of the 1881 law. We have seen above that the criminal wrong of defamation as a

¹³⁰ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIB and Chapter 5: The remedial aspects of defamation: modes of protecting reputation and their functions, IVD.

¹³¹ Lawrence McNamara, *Reputation and Defamation* (OUP 2007), 35-36.

¹³² *Ibid.*, 31.

¹³³ Law and Martin (n 102), ‘Rehabilitation’.

whole was designed to prevent breaches of the public peace.¹³⁴ In order to make this protection effective, the principle was that any defamatory matter was held to be private, except in those cases where the subject matter of the publication corresponded to one of the two recognised instances of public interest. It is therefore the preservation of a broad private domain that allowed the prevention of breaches of the peace. In other words, the existence of a large private domain was justified by a recognised public interest in preserving and promoting social cohesion.

Although the 1944 ordinance modified the defence of truth, the changes it implemented were limited to inverting the pre-existing paradigm of the *exceptio veritatis*.¹³⁵ Such inversion to the paradigm of the *exceptio veritatis* was subject to a number of exceptions, including that in article 35, *alinéa* 3 a) of the 1881 law (which is the only one that survives to this day). The definition of the concept of ‘private life’ was not amended, and so it remained interpreted until recently as covering matters ‘not in the public interest’.¹³⁶ In this context, because the legislator did not introduce any change to the spirit of the defence, it is arguable that underlying the exception in article 35, *alinéa* 3 a) is still a philosophy of promoting the public interest in social cohesion.¹³⁷

Therefore, much in the same way as in England, the exception to the general principle that no liability will arise in relation to true defamatory statements is protecting the individual’s privacy *as a means* to promote social cohesion. This interpretation of the English and French *replicationes* is in line with the argument made in Chapter 1 that reputation is protected as a fundamental aspect of social interaction.

¹³⁴ See above, IIIA.

¹³⁵ See above, IIIB1.

¹³⁶ Ibid.

¹³⁷ Note that the definition of ‘private life’ in art. 35, *alinéa* 3 a) has gradually grown closer to that in art. 8 ECHR and art. 9 of the Civil code: see above, IIIB1. When the legislator recognises this change and amends the law on the press to reflect it, the underlying philosophy of art. 35, *alinéa* 3 a) as a provision pursuing an objective of social cohesion will become out-dated.

3. *Revisiting the replications in light of the ultimate balancing test*

The current protection afforded to privacy interests through the law of defamation is therefore not conceptually wrong. What is more, in light of the current ‘rights context’¹³⁸ this discussion may become irrelevant. It has been noted above that the article 8 ECHR right to private life now extends to protection of one’s reputation.¹³⁹ The result is a change in the way in which cases are approached. In the context of privacy, a new methodology has been recognised in what is commonly labelled the ‘ultimate balancing test’. Lord Steyn described it as follows:

‘First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.’¹⁴⁰

The Joint Committee on the Draft Defamation Bill largely ignored the impact of this new methodology on the substantive law of defamation.¹⁴¹ However, since reputation now falls within the scope of article 8 ECHR along with privacy, it was unlikely that this ultimate balancing test would remain confined to privacy cases. In the past years, domestic courts have referred to these balancing issues in a number of defamation cases.¹⁴² These references are not just theoretical. They have led to a change of perspective in the law of defamation, whereby article 10 ECHR is no longer the starting point. Rather, articles 8 and 10 ECHR are balanced against one another. The substantive law of defamation has evolved to

¹³⁸ Labelled as such by Parkes *et al* (n 12), Chapter 1, Section 3.

¹³⁹ See above, IIIA.

¹⁴⁰ *Re S (A Child)* (n 111), [17].

¹⁴¹ Joint Committee on the Draft Defamation Bill, *First Report: Draft Defamation Bill* HL 203, HC 930-I (2011-12). The issue of the balancing test was only briefly touched upon in para 18.

¹⁴² See, specifically: *Attorney-General’s Reference No.3 of 1999* (n 109); *Re Guardian News* (n 109); *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273, [44].

recognise this change of perspective. In *Flood v Times Newspapers Ltd*,¹⁴³ Tugendhat J thus considered that Lord Nicholls' view in *Reynolds* according to which 'any lingering doubts should be resolved in favour of publication',¹⁴⁴ could no longer be sustained.¹⁴⁵ This is because it unduly prioritised freedom of expression over the protection of reputation.^{146,147}

When adopting the balancing methodology, the understanding of truth as an absolute defence is difficult to sustain.¹⁴⁸ Its permissibility would then be based on an enquiry as to whether the matter was one in which the public had a legitimate interest. This would create a hybrid defence, sitting between the current defences of truth and qualified privilege. In light of this balancing approach, the exceptions contained in section 8(5) ROA and article 35, *alinéa* 3 a) can no longer be challenged, because they are an expression of Lord Steyn's new methodology.

Indeed, framed in Strasbourg terms, the reasoning underlying section 8(5) ROA is that 'because rehabilitation is a good in itself, there comes a point when it is both necessary and proportionate in a democratic society to restrict freedom of speech, in so far as revelation of the conviction(s) would simply be raking up the past and undermine the individual's rightful opportunity to be accepted back in society.'¹⁴⁹ Eady J suggests that in light of the rights compliant new

¹⁴³ *Flood v Times Newspapers Ltd* (n 109).

¹⁴⁴ *Reynolds* (n 110), 205.

¹⁴⁵ Note, however, that *Reynolds* could be read as implementing (at least in part) the European Court of Human Rights' approach to questions involving art. 10 ECHR. Indeed, Bennett notes that in the House of Lords the enquiry focused on the nature of the information rather than on the circumstances of its publication. Therefore, 'the effect of the *Reynolds* defence is to make the tort of defamation an essentially completely new tort... – one which is properly Convention-rights compatible.' Consequently, the domestic courts would in all defamation cases need to consider the importance of the claimant's art. 8 right to reputation. See: Thomas DC Bennett, 'Horizontality's New Horizons - Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 2' (2010) 21 Ent L Rev 145, 146-47. However, in light of the precedence afforded to art. 10 ECHR over art. 8 in the same case, the transition to a fully Convention-rights compliant tort was incomplete.

¹⁴⁶ *Flood v Times Newspapers Ltd* (n 109), [136]-[146].

¹⁴⁷ On further analysis of the potential impact of this new balancing methodology on the English law of defamation, see: Alastair Mullis and Andrew Scott, 'The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law' (2012) 63 NILQ 27, 48ff.

¹⁴⁸ Contra, arguing in favour of maintaining an absolute defence of truth: Mullis and Scott, 'The Swing of the Pendulum' (n 147), 52-53.

¹⁴⁹ Eady J (n 121), 9.

methodology this reasoning, which is based on proportionality,¹⁵⁰ might find itself extended to other inconvenient facts.¹⁵¹ Interestingly, this balancing approach tends to reinstate the criminal law's 'truth and public interest' approach,¹⁵² thus marking a break between the private nature of English defamation claims and the way in which the role of truth would be conceptualised.¹⁵³

Likewise in the context of article 35 *alinéa* 3 a), the *Cour de cassation*'s historical casuistic approach which sees 'private life' as matters 'not in the public interest' is in line with the Strasbourg balancing of competing rights. By considering whether the disputed statement was in the public interest, it clearly seeks to find a just equilibrium between the right to reputation protected by article 8 ECHR and that to freedom of expression protected by article 10 ECHR.¹⁵⁴ Note, however, that this rights-compliant interpretation is subject to the gradual evolution of the 1881-specific understanding of 'private life' into that of article 9 of the Civil code. An alignment with the Strasbourg approach might involve reversing, or at the very least halting such process.

Viewed from the lens of the new methodology, the current *replicationes* are therefore undoubtedly within the scope of the law of defamation. This means that if the rights context is to permeate the substantive rules on defamation, their

¹⁵⁰ Some might even say that this reasoning is based on the public interest. Before the ROA was enacted, an earlier version of s. 8(5) provided that truth would be a permissible defence if the publication of the words complained of was in the public interest. The notion of public interest was replaced by that of malice because some of the Lords thought it too uncertain; and the malice threshold was accepted 'partly because the Bill was running out of time' (Dworkin, 'Rehabilitation of Offenders Act 1974' (n 121), 433). But in a leading textbook on defamation, it is suggested (albeit with some recognised hesitations) 'that the legislature had in mind that there were good and bad reasons for disclosing spent convictions and that a defendant whose reason was bad might be held to be malicious.' A 'bad' reason would include cases where 'a defendant discloses a spent conviction merely in order to damage the claimant or to further some interest of his own, or perhaps where he knows that the information cannot be legally'. This is in line with the understanding of malice described in Chapter 3 as ill will or the intent to injure the claimant. By contrast, a 'good' reason might include 'information which can reasonably be regarded as relevant to the recipient', which in fact might be read as referring to an element of public interest. See: Parkes *et al* (n 12), 18.17, and 18.17 fn 77.

¹⁵¹ Eady J (n 121), 9.

¹⁵² In this sense, see Laws LJ's remark in *Waterson v Lloyd* [2013] EWCA Civ 136, [2013] All ER (D) 349, [67]: he notes 'the common law's increasing focus in this area on the balance to be struck between public interest and individual right'.

¹⁵³ See above, IIIA.

¹⁵⁴ In this sense: Lyn (n 122), 3.

existence will no longer be challenged as constituting a conceptual oddity in the law of defamation. This would further strengthen the conceptual similarity of the English and French approaches to the defence of truth.

C. A shared approach to the truth defence

We have seen in section III that the French rules on truth have grown closer to the English model. There also exist further indications of similarity between the two systems. This section has identified two major parallels as between English and French law. Both treat truth as a defence and recognise a presumption of falsity, meaning that the legal burden to prove the truth of the statement is on the defendant. This illustrates the fact that both systems tend to recognise greater moral harm in being left uncompensated for a false defamatory statement than in being held to account for a true statement. Further, both systems recognise that in some situations, the public interest in social cohesion justifies the restriction of the availability of the truth defence. And so although each system is influenced by the historical development of its rules on defamation and its legal culture, in respect of truth they share the same approach. This will be all the more evident if the rights context does lead to the ‘new methodology’ developed in privacy cases being applied in defamation cases.

V. Conclusion

As seen above, the role of truth has significantly evolved in France. Due to societal changes, defamation is no longer a threat to the public peace. This has resulted in the gradual privatisation of the action, bringing the rules on truth closer to their English counterpart. The link between the French regulatory features and the substantive content of the rules on truth has therefore been broken. In fact, the comparative analysis has brought to light a similar doctrine of truth. The English and the French laws of defamation have notably categorised truth as a defence, thereby balancing conflicting rights in the same way, and have introduced limitations by reference to the public interest in social cohesion. This similarity in the treatment of truth will likely be strengthened by the rights context, in which defamation must now be seen as the interaction between two

fundamental rights: freedom of expression and reputation. As such, in relation to the truth defence, the link between the regulatory features and the substantive content of rules has been broken. This makes truth the clearest practical example of a shared approach to defamation liability, both conceptual and substantive.

CHAPTER 5

THE REMEDIAL ASPECTS OF DEFAMATION: MODES OF PROTECTING OF REPUTATION AND THEIR FUNCTIONS

I. Introduction

Thus far, the comparative analysis has highlighted a tension between path dependence leading to institutional persistence on the one hand, and functional adaptability on the other hand. Due to the persistence of the tort/crime divide, another fundamental issue to be considered is that of remedial aspects of the wrong, whose institutional form is largely dictated by the nature of the regulation. The purpose of this chapter is therefore to consider whether and to what extent there is agreement in respect of responding to reputational damage, in light of each jurisdiction's regulatory features.

The analysis is functional in nature. It goes beyond the superficial comparison of tortious remedies and criminal penalties and rather focuses on the objectives that the English and French remedial aspects of defamation are striving to achieve. At first sight, the remedial goals of the English and French legal responses are aligned with the general objectives of tort and criminal law and so are not comparable. In England, damages are the standard remedy and aim at compensating the claimant and vindicating his good name. In France, the fine primarily acts as a punishment for the defendant. Contrary to this, the chapter argues that in practice, both English and French defamation proceedings feature a combination of compensatory, vindicatory and punitive aims and so are functionally comparable. What is a more, they share what will be termed a 'hybrid' model of defamation liability; the chapter explains why this model exists in both jurisdictions.

First, I outline the English and French legal responses to defamation, their official goals, and note the correspondence with the objectives of tortious remedies and criminal penalties. Second, I challenge the strength of this link by establishing that in practice the English and French remedial aspects of

defamation are functionally comparable and that in fact they both implement a hybrid model of liability. Third, I explain this discrepancy on the basis of a lack of reflection on the main modes of protecting reputation outlined in Chapter 1. I then argue that the current approach is illogical and rationalise the protection of reputation on the basis of only two of the four modes of protection. In the final section, I consider the wide-ranging practical consequences of this approach.

II. The apparent link between the stated objectives of defamation proceedings in England and France and the nature of the regulation

In this section, I outline the legal responses available in the English and French laws of defamation, their stated objectives, and argue that they exemplify the modern tortious and criminal responses to a wrong. This suggests that they are directly dictated by the regulatory features of each jurisdiction and, as such, are not comparable.

A. Current remedial aspects of defamation in English and French law

The outcome of a successful defamation claim differs as between England and France. In what follows, I outline the legal responses available in the English and French laws of defamation.

1. English remedies

Traditionally in the English tort of defamation, a successful claimant can receive two kinds of remedies: an award of damages, and an injunction. Whilst claiming both is standard practice, ‘it is the award of damages, not the grant of an injunction (in lieu of an undertaking), which is the primary remedy which the law provides on proof of this tort’.¹ The Defamation Act 2013 has established

¹ *John v MGN Ltd* [1997] QB 586, [1996] 2 All ER 35, 607. Sir Thomas Bingham MR (as he then was) justifies this on the basis of the discretionary nature of an award of injunctions, which is usually dependent on recovery of damages; and on their forward-looking aspect, which does not provide redress for what happened in the past.

two further remedies. Sections 12(1) and 13 respectively allow a court giving judgment for the claimant to order the defendant to publish a summary of the judgment, and to order the operator of a website to remove the statement or any person who was not the author, editor, or publisher² of the statement to stop distributing, selling or exhibiting it.

For the purposes of the law of defamation, there are two relevant types of injunctions: interim injunctions restraining publication pending trial, and final injunctions after trial. The courts exercise exceptional caution when awarding injunctions³ in defamation cases, because of the obvious conflict with the right to freedom of expression.⁴

The continued priority afforded to freedom of expression⁵ might evolve on account of the European Court of Human Rights' modern jurisprudence.⁶ Nevertheless, the preferred remedy remains an award of damages. This award is sophisticated: the court may award not only general compensatory damages, but

² This designates any person who is not a defendant under ss. 5 and 10 of the Defamation Act 2013. Therefore, s. 13 mirrors the measures that can be ordered in a final injunction, but makes them available in relation to another category of persons.

³ This caution is relevant to the award of both final and interim injunctions. In both cases, such award is subject to art. 10 of the European Convention of Human Rights (ECHR) and art. 12 of the Human Rights Act (HRA). However, this rule is not as important in relation to final injunctions, which are held to be a legitimate and proportionate interference with the right to freedom of expression when they merely prevent repetition. In this sense: Richard Parkes *et al*, *Gatley on Libel and Slander* (Sweet & Maxwell 2013), 9.41.

⁴ See below, n 5 and 6.

⁵ According to the long-standing rule in *Bonnard v Perryman* [1891] 2 Ch 269, [1891-4] All ER Rep 965, no interim injunction can be awarded in libel cases unless it is shown that the claim is bound to succeed because no defence has a realistic chance of success.

⁶ The art. 10 ECHR right to freedom of expression took priority over the protection of the individual's reputation, which was only mentioned as an exception in art. 10(2) ECHR. But in recent years, the Court has come to consider (albeit not always consistently) that the art. 8 ECHR right to private life extends to the protection of one's reputation. As was seen in Chapter 4, IVB3, this might involve the extension to the law of defamation of the rights-compliant 'new methodology' embodied in Lord Steyn's ultimate balancing test. In the 2004 appellate case of *Greene v Associated Newspapers Limited* [2004] EWCA Civ 1462, [2005] 1 All ER 30 the court continued to give priority to freedom of expression. However, Tugendhat and Christie doubt that this priority will survive and suggest that when *Greene* is revisited by the Supreme Court the balance struck between reputation and freedom of expression might be modified. See: Michael Tugendhat and Iain Christie, *The Law of Privacy and the Media* (OUP 2011), 7.65ff. Also see, a further discussions of this topic: David Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy' (2012) 17 MALR 170; Normann Witzleb, 'Interim Injunctions for Invasions of Privacy: Challenging the Rule in *Bonnard v Perryman*' in Normann Witzleb *et al* (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (CUP 2014).

also aggravated, special and exemplary damages. This is presumably designed to make the damages award an effective remedy, providing sufficient satisfaction to the defamed claimant. Therefore, each type of damage has a specific function. General damages (which are presumed upon proof of publication),⁷ aggravated damages (which account for the aggravation of the injury to the claimant's feelings due to the defendant's conduct) and special damages (which cover any material or financial loss) are primarily designed to compensate the claimant for the damage to his reputation and to vindicate his good name.⁸ In addition, the court may choose to award exemplary damages where the defendant has deliberately libelled or slandered the claimant for profit. However, this award remains exceptional and in some ways anomalous, since it departs from the primarily compensatory purpose of tort law⁹ and conflicts with the right to freedom of expression.¹⁰

2. *French penalties*

In France, the primary responses to the wrong of defamation consist in a fine and/or (exceptionally) in a prison sentence. Their severity depends on the type of claimant and of statement. For a simple case involving the defamation of a private individual, since the law of 15 June 2000 abolished any possibility of imprisonment, the main penalty is a fine of up to €12,000.¹¹ No additional penalties may be pronounced: in a recent case, the *Cour de cassation* quashed an appellate decision sentencing a convicted defendant to the payment of a fine and the publication of the judgement.¹² The penalties are more severe for aggravated forms of defamation. The amount of the fine is increased up to €45,000; and instances of discriminatory defamation can still lead to a prison sentence of up to

⁷ Reputational loss is presumed: *Parkes et al* (n 3), 9.4.

⁸ *John v MGN* (n 1), 607.

⁹ *Ibid*, 617.

¹⁰ In this sense: *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, 1228: 'Freedom of speech should not be restricted by awards of exemplary damages save to the extent shown to be strictly necessary for the protection of reputations'; *Mosley v News Group Newspapers Ltd* (No 3) [2008] EWHC 1777, [2008] EMLR 20, 188-97, specifically 197: 'exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority (whether statutory or at common law) to justify such an extension and, indeed, it would fail the tests of necessity and proportionality.'

¹¹ Art. 32 *alinéa* 1 and art. 33 *alinéa* 2.

¹² Cass crim, 28 January 2014, n°12-87.987. On this type of redress, see further below VB.

12 months since they were explicitly excluded from the scope of the law of 15 June 2000.¹³

As is the case in England, great caution is exercised when considering the award of interim injunctions. This is because they directly conflict with the spirit of the 1881 law, which proclaims in article 1 the principle of freedom of the press.¹⁴ There exist two types of injunctions: those awarded on the basis of the ordinary law, and those labelled *référé spéciaux* (special injunctions). The latter category comprises injunctions for violations of one's privacy and of one's presumption of innocence.¹⁵ The former type of injunctions, based on articles 808 and 809 of the Civil procedure code, is only subsidiary to the *référé spéciaux*. These 'ordinary' injunctions are typically awarded on the basis of a manifestly unlawful act or to prevent immediate damage, exclusively on the basis of urgency. They were used regularly in the 1960s to prevent wrongful interferences with individuals' reputations;¹⁶ nowadays they remain the main type of injunctions awarded in relation to press wrongs.

B. The apparent link between the remedial aspects of defamation and the regulatory features in England and France

In order to best understand the English and French remedial aspects of defamation, it is necessary to move beyond a superficial comparison of tortious damages awards and criminal fines and consider the objectives that the English and French remedial aspects of defamation are striving to achieve. A discrepancy can be noted at the outset – while in England, some attention has been paid by the courts to the functions of remedial awards, the French courts and doctrinal writers have largely ignored this issue. Therefore, the following discussion is based on the stated objectives underpinning the English remedial awards, but only on the underlying objectives of the French penalties.

¹³ Art. 24 *alinéa* 6 of the law of 29 July 1881.

¹⁴ Bernard Beignier, *L'Honneur et le Droit* (LGDJ 1995), 150. He notes that injunctions aim at preventing the realisation of harm whereas the purpose of the 1881 law is to punish and repair the harm caused.

¹⁵ These are awarded respectively on the basis of art. 9 and art. 9-1 *alinéa* 2 of the Civil code.

¹⁶ Emmanuel Dreyer, *JCl. Communication*, Fasc. n°3710, 40.

In English defamation proceedings, damages are the standard remedy. Analysing the remedial goals of the compensatory damages award, Sir Thomas Bingham MR (as he then was) explained that:

‘The successful claimant in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused.’¹⁷

By contrast, in France there is little (if any) analysis of the remedial goals of defamation actions. However, since the wrong of defamation falls within the scope of criminal law and criminal sanctions are primarily punitive,¹⁸ the purpose of French defamation proceedings must be (at least in part) punitive. No other remedial goal is officially recognised, whether by the courts or doctrinal writers.¹⁹

One argument could be advanced, suggesting that criminal wrongs (including defamation) in a sense pursue compensatory goals. This is because the *action civile* procedure allows a claimant to bring a tortious compensatory claim before a criminal court. However, this argument would be misguided. Indeed, the criminal penalties (in the defamation context, the payment of a fine) and tortious

¹⁷ *John v MGN* (n 1), 607.

¹⁸ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VE. In the French context: Bernard Bouloc, *Droit Pénal Général* (23rd edn, Dalloz 2013), 27ff. Although Bouloc uses the word *rétributif* (ibid, 28), it is best translated as punitive rather than retributive. Indeed, it is apparent from the following discussion (ibid, 29ff) that the main aim of criminal penalties is not to inflict harm on the defendant for its own sake (as is implied in the use of the word ‘retributive’), but rather to inflict harm as a means to achieve a further goal. In this context, my choice to use the terminology of ‘punitive’ is intended to leave open what the ultimate goal of punishment is. I chose to ignore a literal translation in favour of one which better reproduces Bouloc’s underlying reasoning.

¹⁹ In fact, doctrinal writers largely ignore this issue. It is not discussed in any of the current major textbooks on the law of defamation (Bernard Beignier *et al*, *Traité de Droit de la Presse et des Médias* (Litec 2009), 749ff; Emmanuel Dreyer, *Responsabilités Civile et Pénale des Médias: Presse, Télévision, Internet* (3rd edn, LexisNexis, Litec 2011), 685-86). Their discussion of remedies is limited to a description of the evolution in the remedies available under the 1881 law.

remedies, and their associated remedial goals, remain conceptually separate from one another.

This claim is perhaps best understood from a historical perspective. The law of the Frankish Empire did not distinguish between civil and criminal wrongs.²⁰ The same procedural rules applied to both, and the standard sanction was the *composition pécuniaire*,²¹ a monetary award that pursued what we can label in modern legal terminology compensatory and punitive goals. Two thirds of the *composition pécuniaire* were paid by the defendant to the victim as compensation; the remaining third was paid to the king and represented a fine imposed on the defendant for breaching the public order.²² Thus, the *composition pécuniaire* sought both to compensate the claimant and to punish the defendant.

This state of affairs was preserved until the 13th century, when the public justice system acquired a monopoly over criminal proceedings. From then onwards, it became progressively accepted that compensatory damages awards were accessory to the criminal penalty.²³ This had two main consequences. First, compensatory damages awards became characterised as a type of *réparation civile* (civil reparation or redress), pursuing distinct objectives from those of criminal proceedings (compensation rather than punishment).²⁴ Second, the fact that one single wrongful act could ground both a criminal sanction and a civil mechanism of redress paved the way for the modern conceptualisation of the relationship between tort and crime. As is the case in England, in France wrongful interference with an individual's right only grounds a tortious cause of action (typically culminating in a compensatory damages award), rather than a criminal one. The criminalisation of conduct depends on the public taking an interest in the wrong or on the articulation of a strong public policy argument in

²⁰ Jean-Marie Carbasse, *Histoire du Droit Pénal et de la Justice Criminelle* (3rd edn, PUF 2014), 44.

²¹ *Ibid*, 44, 48.

²² *Ibid*, 49.

²³ *Ibid*, 157.

²⁴ *Ibid*.

favour of criminalising conduct.²⁵ However, contrary to England, tort and criminal law (and relatedly, tortious and criminal proceedings) are not procedurally separate from one another. In France, because the fault requirements in civil and criminal wrongs are often identical²⁶ one single wrongful act can constitute both a civil and a criminal wrong. This has had a significant impact on procedural rules, including the fact that the *action civile* (a tortious claim typically brought on the basis of article 1382 of the Civil code) does not have to be brought before a civil court independently from the criminal proceedings.²⁷ An *action civile* can be brought before a criminal court,²⁸ and the criminal judge subsequently gives a decision on both the criminal action and the combined civil claim. Bringing the *action civile* is not mandatory; however, once an *action civile* is attached to the criminal proceedings, a defendant whose liability is established is liable for both the criminal penalty and the payment of compensatory damages.

Yet, despite the fact that the criminal proceedings and the tortious claim are procedurally linked, they remain conceptually separate from one another. Indeed, they are brought on different grounds (criminal proceedings on the basis of the wrong as established by the Criminal code or other criminal laws, and tortious claims on the basis of article 1382) and pursue different goals (of punishment and compensation respectively).²⁹ Therefore, it would be wrong to interpret the *action civile* procedure as a mechanism integrating a general compensatory goal in French criminal claims (including defamation claims).

At first sight, these remedial goals of English and French defamation proceedings (whether stated or underlying) are aligned with each jurisdiction's regulatory features. Indeed, as the distinction between civil and criminal liability

²⁵ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VF.

²⁶ Note that they are often, but not *always* identical: see Bouloc (n 18), 97.

²⁷ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VB.

²⁸ Art. 3 of the Criminal procedure code.

²⁹ Note that in defamation cases the *action civile* is not brought on the basis of art. 1382 of the Civil code but on that of the law of 29 July 1881. This has significant consequences, which will be considered below in section IIIB.

emerged, each system also began to distinguish between civil remedies and criminal penalties. This distinction is now entrenched in the law. As was seen in Chapter 1,³⁰ over time tortious remedies and criminal penalties have developed distinct characteristics (including specific remedial goals) that find an echo in the English and French responses to the wrong of defamation.

First, the remedial goals of English damages awards are aligned with the objectives of English tort law. According to Honoré,

‘[O]ne point of creating a tort ... is to define and give content to people’s rights by providing them with a mechanism for protecting them and securing compensation if their rights are infringed.’³¹

Thus, the main purpose of tortious remedies is to put the claimant in the position he was in prior to the commission of the wrong.³² This is typically achieved through the paradigmatic award of compensatory damages.³³ Defamation law’s concern to compensate the claimant, both for the injury to reputation and his injured feelings, is clearly in line with this general approach. It must be noted that compensation of injured feelings, sometimes referred to as ‘*solatium*’, is not an extraordinary occurrence in tort law.³⁴ This remedial goal is encountered in a number of other tortious causes of action when the rights that have been wrongfully interfered with do not have patrimonial consequences, including in

³⁰ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, V.

³¹ Tony Honoré, ‘The Morality of Tort Law - Questions and Answers’ in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1995), 75. In this sense in France: Boris Starck, *Essai d'une Théorie Générale de la Responsabilité Civile Considérée en sa Double Fonction de Garantie et de Peine Privée* (L Rodstein 1947).

³² See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VE.

³³ Note that in various torts (the best illustration being the tort of misuse of private information) the courts can also award interim injunctions pending trial. However, their purpose differs from that of compensatory awards. They do not aim at putting the claimant in the position he would have been in had the wrong not been committed. Rather, they seek to prevent the putative wrong from occurring.

³⁴ But see below IIIB, which objects to the protection of injured feelings in the law of defamation.

the tort of misuse of private information.³⁵ The second remedial goal of defamation actions acknowledged by Sir Thomas Bingham MR is the vindication of the claimant's good name. In England, vindication is not only a formal goal of the law of defamation; it is more generally recognised as a goal of English tort law³⁶ in that it 'mark[s] the infringement of a right.'³⁷ So, the two main remedial goals of English defamation law comply with those of English tort law.

The one remedial goal that is not stated as a formal objective of English remedies in defamation proceedings, but that is at first sight the sole remedial goal of French defamation actions, is that of punishing the defendant.³⁸ This is presumably because in England defamation is a tortious wrong, and punitive objectives typically characterise criminal, rather than tortious proceedings. Indeed, the main purpose of creating a criminal wrong is to deter future wrongdoing through threat of criminal liability and, failing that, to punish the defendant for committing the wrong.³⁹ Criminal penalties are primarily punitive: they punish the defendant for the morally or socially wrongful act that he committed. This is generally achieved through the imposition of a prison sentence, of a fine or of alternative measures that restrict or remove the accused's liberty.⁴⁰ In light of this, it is rather unsurprising that punishment is not recognised as a remedial goal of defamation proceedings in England, since the criminal wrong of defamatory libel was formally abolished by section 73 of the Coroners and Justice Act 2009. It is equally unsurprising to find that punishment

³⁵ In this sense: Eric Descheemaeker, 'Solatium and Injury to Feelings: Roman law, English law and Modern Tort Theory' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law* (Hart Pub 2013), 78.

³⁶ See, for example, *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328, [19]: 'An award of compensation will go some distance towards vindicating the infringed... right.' See, generally: *R (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. This has led to the recognition of a new category of damages, 'vindicatory damages'. The existence of this vindicatory goal is also recognised in a variety of textbooks, some of which are listed in Jason NE Varuhas, 'The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 1, fn 1.

³⁷ *Lumba v Secretary of State for the Home Department* (n 36), [99].

³⁸ There is one major exception to this statement, which is the possibility to award exemplary damages. Its significance is considered below in section IIIA.

³⁹ Bouloc (n 18), 496.

⁴⁰ Ibid, 558ff.

is an underlying remedial goal of the French wrong of defamation, given that it is formally a criminal wrong.

The above comparison of the English and French responses to the wrong of defamation reveals significant differences between the two jurisdictions. Each system seemingly has a different focus and recognises different remedial goals. The English tortious action focuses primarily on compensating and vindicating the claimant. On the other hand, the very nature of the French criminal action mandates a focus on punishing the defendant. While in both jurisdictions the primary remedy is monetarised, in England it consists in a damages award and in France it is a fine. In practice, this means that the former focuses on the harm suffered by the claimant, with the award serving a compensatory purpose; whereas the latter focuses on the defendant's wrongful act, and the fine is paid to the Public Treasury as a punishment.⁴¹

These characteristics are distinguishing traits of tortious and criminal types of regulation respectively, and correspond to each system's regulatory features. In view of this observation, the respective responses to the wrong appear to have been dictated by these features. It is therefore tempting to conclude that the English and French remedies for defamation evidence distinct approaches to the wrong, and so are not comparable.

III. The functional comparability of English and French remedies

Contrary to the preliminary conclusion reached in the previous section, this section argues that in practice the remedial aspects of defamation are functionally comparable in England and France. First, English tortious proceedings have grown to accommodate a punitive goal. Second, French criminal proceedings have come to integrate a vindictory and a compensatory goal. This has resulted in the creation of a hybrid model of liability, which draws on the tortious and the criminal models of liability, and reveals a shared conceptual approach to the remedial aspects of defamation.

⁴¹ Roger Merle and André Vitu, *Traité de Droit Criminel*, vol 1 (7th edn, Cujas 1997), 788ff.

A. The English tort of defamation and the punitive goal

English tort law officially does not punish: ‘the object of the award of damages in tort nowadays is not to punish the wrongdoer, but to compensate the person to whom the wrong has been done.’⁴² There are two objections to this statement of principle. The first is not specific to defamation proceedings; it relates to the availability of exemplary damages in tort law generally. The second is specific to defamation claims. It is that general damages contain an element of punishment, which acts as a *solatium* to compensate (or console) the claimant’s injured feelings.

In special circumstances, tort law allows for the award of exemplary (or ‘punitive’) damages. Their anomalous presence in tort was examined in the seminal case of *Rookes v Barnard*.⁴³ Lord Devlin rationalised the rules regulating the award of exemplary damages by analysing the pre-existing cases in which they had been awarded. He uncovered three categories in which exemplary damages can be awarded,⁴⁴ as well as three considerations to be taken into account when awarding them.⁴⁵ Defamation cases for which exemplary damages are awarded fall under the second category. These are cases in which the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant. This typically involves media defendants rather than private individuals, since they engage in activities aimed at profit.

⁴² *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, [1964] 3 All ER 947, 106 (per Pearson LJ).

⁴³ Above n 10.

⁴⁴ *Ibid*, 1226-27: ‘The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. ... Cases in the second category are those in which the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant. ... To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute.’

⁴⁵ *Ibid*, 1227-28: ‘First, the claimant cannot recover exemplary damages unless he is the victim of the punishable behaviour. ... Secondly, the power to award exemplary damages constitutes a weapon that ... can also be used against liberty. ... Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant’s conduct is relevant.’

Prior to *Rookes v Barnard*, ‘punitive’ damages were loosely described as ‘inflict[ing] an added burden on the defendant proportionate to his conduct.’⁴⁶ They were therefore punitive in a literal sense. Following *Rookes v Barnard*, punishment is described as a means rather than as an end. Their punitive *effect* is widely accepted, but punishment is not recognised as a *purpose*.⁴⁷ Rather, it is considered to be incidental to exemplary damages’ goal of deterrence.⁴⁸ The validity of this distinction is doubtful. Simons notes that it is a characteristic of criminal wrongs to punish, *whether as a means or an end*.⁴⁹ So punishment, even as a means to attain a further goal, theoretically has no place in tort law. Further, the differentiation between purpose and effect is near impossible to operate in practice. The interchangeable use of ‘exemplary’ and ‘punitive’ labels in different common law jurisdictions⁵⁰ is, in itself, an indication that it has proved impossible to fully abandon the punitive goal. This view is reinforced by the fact that the amount of damages is determined by reference to the profit putatively made from the defamatory statement. Such focus on the consequences of the defendant’s wrong, rather than on the claimant’s losses, strongly echoes the criminal law’s punitive features.⁵¹

This punitive aim will likely have a more limited incidence for media defendants now that the Crime and Courts Act 2013 has come into force. By virtue of sections 34(1) and 34(2), and subject to the exceptions in section 34(3), exemplary damages can no longer be awarded against a defendant publisher in

⁴⁶ *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, 1071.

⁴⁷ *McCarey* (n 42), 107: ‘This is not punishment; it is merely preventing the defendant from obtaining a reward for his wrong-doing’.

⁴⁸ *Cassell* (n 46), 1073: ‘Speaking for myself, I prefer “exemplary,” not because “punitive” is necessarily inaccurate, but “exemplary” better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that “tort does not pay” by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.’ The idea of incidental punishment is drawn from James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Pub 2002), 10.

⁴⁹ Kenneth W Simons, ‘The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives’ (2008) 17 *Widener LJ* 719, 729.

⁵⁰ The United States and Canada describing them as ‘punitive’ whereas Australia, New Zealand and England settled for the ‘exemplary’ label. See: Edelman (n 48), 11.

⁵¹ In this sense, see Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VE.

relation to the publication of news-related material if the defendant was the member of an approved regulator at the relevant time. This may reduce the number of cases in which exemplary damages will be awarded.

However, some measure of punishment is also found in defamation cases in the award of general damages. According to Smith, damages awards may be analysed as serving a function similar to that of criminal penalties. He distinguishes two approaches to damages:

‘The first way, which I call the duty view, supposes that damages awards confirm existing legal duties to pay damages. According to this view, damages awards are structurally similar to awards that require defendants to do things such as deliver contractually promised goods, cease nuisances, or pay contractual debts. Like these awards, damages awards are essentially rubber stamps: they require defendants to do what they should have done already. In contrast, the second way of understanding damages awards, which I call the liability view, supposes that insofar as it makes sense to speak at all of legal duties to pay damages, such duties are created – not confirmed – by damages awards. According to this view, damages awards are structurally similar to awards that require criminal wrongdoers to pay fines.’⁵²

The argument that general damages serve a punitive purpose is supported by the fact that from a comparative perspective, the quantum of English damages awards is extremely high. In France, damages awards are historically considerably lower than in England.⁵³ To this day, damages in England are very high, with a current ‘ceiling’ figure of around £275,000.⁵⁴ On the other hand, in France the compensation offered to the *partie civile* is typically in the few thousands of euros.⁵⁵ Yet the method of calculating the quantum of damages is

⁵² Stephen Smith, ‘Duties, liabilities, and damages’ (2012) 125 Harvard L Rev 1727, 1727.

⁵³ Ignace Rothenberg, ‘Damages for Libel in the United States and on the European Continent’ 24 Journal of Comp Leg and Int Law 6, 12.

⁵⁴ *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015, [25].

⁵⁵ Patrick Auvret, *JCl. Communication*, Fasc. n°3705, 94.

similar to the English one and takes into account the same type of factors. These include the extent to which the statement was circulated, the fact that the victim had a bad reputation to start with and any relevant aggravating circumstances.⁵⁶ There is no reason to suppose that a defamed person suffers less in France than in England. Likewise, nothing suggests that reputation is valued less in France than it is in England. In fact, the tradition of avenging an insult by blood rather than by money survived longer on the continent,⁵⁷ and even seeped from the aristocracy into the middle classes.⁵⁸ This suggests that reputation possesses a value in France that is at the very least comparable to that which it possesses in England.

There are various ways in which to interpret this discrepancy in the quantum of damages. It could be the result of the arbitrary pricing of a lost reputation in two different countries. It could also be a legacy of jury trials, whereby in the absence of a reasoned judgment (which typically concludes a judge only trial), a higher sum was needed to vindicate the claimant's name.⁵⁹ Alternatively (or perhaps in conjunction with the previous interpretations), the lower quantum of compensatory awards in France may account for the fact that the defendant has already been punished. Indeed, we noted in Chapter 1 that the concept of 'vindication' is multi-faceted.⁶⁰ There are two aspects to it: one relates to the honour construct of reputation and is punitive, the second relates to the sociality construct of reputation and is communicative. However, there exists no accepted definition of vindication in the case law. This may have created some confusion in the law of defamation about the meaning of 'vindication' and led to an amalgamation of both communicative and punitive types of vindication. Thus, the English tort of defamation currently accommodates a measure of punishment, which (wrongfully) partakes in convincing the public of the baselessness of the charge. Indeed, in the current state of the law it is clear that in itself a judgement

⁵⁶ Ibid, 48ff.

⁵⁷ Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IVA.

⁵⁸ Rothenberg (n 53), 12.

⁵⁹ In this sense, see *Cairns v Modi* (n 54), [30].

⁶⁰ Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIA.

for the claimant, or a symbolic damages award, will not be sufficient to vindicate the claimant's reputation.⁶¹

Under this view, which adheres to both the duty and the liability views described above, the award of general damages in the tort of defamation can be split into two. Reflecting the duty view, the first part is indeed compensatory; the second, which is in excess of compensation, reflects the liability view and is punitive. However, owing to the inherent difficulty of providing a pecuniary assessment for non-pecuniary loss (and the consequent difficulty to draw a line between the compensatory and the punitive aspects)⁶² the courts do not itemise or distinguish between the two parts of the award.

As a result, the claim made in section II that a link exists between the regulatory features of English defamation law and the available responses must be refined. Indeed, the general goal of punishment is one that is typically associated with criminal, rather than with tortious claims. The link between the tortious nature of the regulation and the available remedies is not as strong as was originally thought.

B. The French criminal wrong of defamation, vindication and compensation

Much in the same way as their English counterpart, French defamation proceedings pursue objectives other than that of punishment. Specifically, they have come to accommodate vindictory and compensatory goals, mirroring the objectives of defamation actions in England.

Two reasons suggest that French responses to defamation accommodate a vindictory goal (admittedly incidental to the punitive one). First, the procedural

⁶¹ In this sense: *Purnell v Business F1 Magazine Ltd* [2007] EWCA Civ 744, [2008] 1 WLR 1, specifically [29]-[30].

⁶² In this sense, see *Rookes v Barnard* (n 10): 'when one examines the cases in which large damages have been awarded for conduct of this sort [involving malevolence or spite], it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed' (per Lord Devlin at 1221).

framework of the 1881 law empowers the victim. While Nathan Oman describes empowerment as a distinguishing trait of tortious, as opposed to criminal proceedings,⁶³ this reasoning can be extended to French defamation claims. Indeed, according to article 48, 6° of the law of 29 July 1881, it is the victim who controls the action in defamation proceedings. The prosecutor can only pursue it on the basis of the victim's official preliminary complaint.⁶⁴ The reason for which this rule was introduced in the 1881 law was that the legislature considered that defamation proceedings might aggravate the pre-existing reputational losses by publicising the defamatory statement. This would produce a result opposed to that which was originally sought in defamation proceedings, which was to avenge the insult suffered by the victim.⁶⁵ It was therefore decided that the power to decide whether a prosecution should be brought would (primarily) be vested in the victim. The prosecutor still has a discretionary power to decide whether or not criminal proceedings should be filed, but he cannot do so without a preliminary complaint on the victim's part. The victim is thereby empowered, as is the case in civil suits. This means that in the same way as in civil proceedings, the victim's act of initiating suit signals her contestation of the truth of the statement. This goes some way to convince the public of the baselessness of the charge. Second, French responses to defamation possess a communicative function which may be analysed as indicating the baselessness of the defamatory statement. Indeed, criminal sentences carry a special stigma, signalling that the defendant's conduct is socially blameworthy.⁶⁶ The value of the punishment partly resides in the communication of the censure imposed on the defendant's act, which in the defamation context informs the public of the fact that the defamatory statement was untenable.⁶⁷ It is interesting to note, in this passage, the clear link that exists between the punitive and the communicative aspects of vindication. These should, in theory, be kept separate from one another; however it is extremely difficult to do so in practice, as was

⁶³ See generally Nathan Oman, 'The Honor of Private Law' (2011) 80 Fordham L Rev 31.

⁶⁴ Christophe Bigot, *JCl. Lois pénales spéciales*, Fasc. n°150, 25.

⁶⁵ Emmanuel Dreyer, *JCl. Lois pénales spéciales*, Fasc. n°80, 161.

⁶⁶ Bouloc (n 18), 506; Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VE.

⁶⁷ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIA.

already seen above in relation to the punitive aspect of English compensatory awards.⁶⁸

Further, despite its criminal nature the French wrong of defamation has come to recognise a goal of compensation, as is evident from the fact that the protection of reputation is sometimes likened to that of a *bien* (good).⁶⁹ The first indicium is found in the fact that, like its English counterpart, French law protects the reputation of corporations.⁷⁰ The case law has no difficulty in recognising that corporate claimants can suffer reputational damage.⁷¹ However, the recognition of a right for corporations to bring defamation proceedings can only be rationalised on the basis of what was described in Chapter 1 as the property construct of reputation.⁷² Indeed, Skolnick notes that ‘a corporation falsely accused of bankruptcy might lose property, but it cannot lose dignity, a distinction that judges do not always appreciate.’⁷³ Therefore, the sole purpose of defamation proceedings in which the defamed claimant is a corporation is to compensate, rather than to console or to vindicate.

A second indicium suggests that this compensatory goal is in fact recognised in respect of all claimants, not just corporations. French doctrinal writers recognise that wrongful interferences with the right to reputation cause losses.⁷⁴ These are usually compensated on the basis of an *action civile*. This mechanism allows the victim of a criminal wrong to obtain civil damages during the course of a criminal process, as if she were bringing a claim before a civil court.⁷⁵ It is available in respect of all criminal wrongs. However, in relation to the wrong of defamation (and press wrongs more generally) the *action civile* departs from

⁶⁸ See above, IIIA.

⁶⁹ Dreyer, Fasc. n°80 (n 65), 1. Note, however, that this is done with caution: the use of quotes (*‘bien’*) indicates that such interpretation is not a standard one. While descriptively correct, it is normatively weak.

⁷⁰ See, for instance: Cass crim, 12 June 1956: Bull crim 1956, n°461.

⁷¹ In this sense: Dreyer, Fasc. n°80 (n 65), 40ff.

⁷² Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIA.

⁷³ Jerome H Skolnick, ‘Foreword: The Sociological Tort of Defamation’ (1986) 74 Cal L Rev 677, 678.

⁷⁴ Ibid, 35; Dreyer, *Responsabilités Civile et Pénale des Médias* (n 19), 1077.

⁷⁵ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, VB.

traditional principles. The action is not brought on the basis of article 1382 of the Civil code as is classically the case, but on the basis of the 1881 law.⁷⁶ This rule was established in order to ensure that victims do not bring an *action civile* on the basis of article 1382 as a way of circumventing the procedural constraints established in the 1881 law. Consequently, a general goal of compensation has been integrated in the law on the press. In fact, in France defamation proceedings do not only compensate the victim's injury to reputation, but also her *préjudice moral* (non-pecuniary losses, which include injured feelings).⁷⁷

The conclusion of the preceding analysis is that the link that originally existed between the regulatory features of French defamation law and its remedial aspects is not as strong as was originally suggested. Indeed, the goals of vindication and compensation are typically associated with tortious, rather than with criminal claims; yet they have seeped into the criminal wrong of defamation.

Overall, England and France both recognise three broad remedial goals in defamation actions: vindication, compensation and punishment. While they are balanced differently in each jurisdiction (England gives primacy to the first two, and France to the third one), they evidence the fact that the English and French remedial aspects of defamation are functionally comparable. Significantly, this finding challenges the strength of the link between the English and French regulatory features and their substantive approach to the remedial aspects of defamation.

C. A hybrid model of liability

The consequence of the functional comparability of remedial goals in defamation actions identified above is the emergence, in both jurisdictions, of a hybrid model of liability. Drawing on the tortious and the criminal models of liability, it focuses both on the damage suffered and the wrong committed, and justifies

⁷⁶ See Chapter 2: The framework of defamation liability in comparative historical perspective, IIB4.

⁷⁷ Dreyer, *Responsabilités Civile et Pénale des Médias* (n 19), 1077.

legal redress by reference to both the claimant's damage and the defendant's wrong. Importantly, it signals the existence of a similar conceptual approach to the remedial aspects of defamation.

In both England and France, the current model of defamation liability focuses both on the damage suffered and the wrong committed. This challenges the classic understanding according to which tort and crime possess different models of liability. Indeed, the traditional representation of the primary purposes of tort and crime being compensation and punishment presupposes the existence of two distinct models of liability. Tort law focuses on 'whether the claimant suffered ... an infringement at the defendant's hands.'⁷⁸ The imposition of liability is the result of a two-step enquiry. First, the claimant must prove that the defendant committed a tortious wrong or wrongfully interfered with his rights. The characterisation of the defendant's wrongful act justifies the imposition of liability. Second, the enquiry turns to the type and extent of damage suffered by the claimant. This determines what is required to correct his or her loss. Criminal law, on the other hand, has a defendant-orientated agenda. Its focus is on 'whether the defendant committed such a wrong.'⁷⁹ So the imposition of liability only involves a one-step enquiry: the characterisation of relevant culpable wrongdoing on the part of the defendant.

The functional comparability of tortious and criminal remedial goals identified in the English and French wrongs of defamation challenges this traditional account of the two models of liability. Since the compensatory and punitive aims coexist in defamation proceedings, the action is divided into two. Insofar as it seeks to compensate the claimant, it focuses on the infringement of his rights and the extent of the damage suffered. Insofar as it seeks to punish the defendant, it focuses on his wrongful act and on the determination of his culpability. In that sense, defamation claims are fundamentally hybrid. They focus both on the damage suffered by the claimant and on the wrong committed by the defendant, which are characteristics of tortious and criminal proceedings respectively.

⁷⁸ R A Duff, 'Torts, Crimes and Vindication: Whose Wrong Is It?' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014), 155.

⁷⁹ Ibid.

The hybridisation of defamation liability is also apparent from the fact that the current English and French models of liability justify the sanctions they impose by reference to both the claimant's damage and the defendant's wrong. Again, this challenges the traditional tortious and criminal models of liability.

In tort, liability is imposed 'for the infringement of the claimant's legally protected rights';⁸⁰ remedies are therefore awarded to correct the claimant's damage. By contrast, in criminal law, liability is imposed 'for the culpable commission of a wrong, which merits condemnation and punishment';⁸¹ penalties are consequently imposed to punish the defendant for the wrong he committed. Contrary to these principles, English and French legal responses to defamation are concerned both with the claimant's damage and the defendant's wrong.

In English law, probably due to the existence of both tortious and criminal remedial goals in defamation cases, the imposition of sanctions in defamation actions is alternatively based on the claimant's damage or the defendant's wrong. Lord Hailsham in *Cassell v Broome* endorsed the approach taken in the High Court of Australia,⁸² in which Windeyer J analysed redress in defamation actions as being awarded on the basis of the wrong committed by the defendant rather than for the damage that ensued.⁸³

'It seems to me that, properly speaking, a man defamed does not get compensation *for* his damaged reputation. He gets damages *because* he was injured in his reputation, that is simply because he was publicly defamed.'⁸⁴

By contrast, other cases still endorse the more traditional tort view according to which damages are awarded in defamation cases to compensate the claimant for

⁸⁰ Duff, 'Torts, Crimes and Vindication: Whose Wrong Is It?' (n 78), 155.

⁸¹ Ibid.

⁸² *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 115.

⁸³ *Cassell* (n 46), 1071.

⁸⁴ *Uren* (n 82), 150.

the damage suffered. For instance, in *John v MGN* Sir Thomas Bingham MR considered that one of the purposes of the compensatory award is to compensate the claimant ‘for the damage to his reputation’.⁸⁵ Recent cases support this approach. Thus, Mr Justice Nicol in the 2014 case of *Kadir v Channel S Television* considered that ‘since the essence of libel is damage to reputation, one purpose of damages is to compensate the claimant for harm to his or its reputation’.⁸⁶ Other purposes listed by this line of cases include the vindication of the claimant’s good name and compensation for distress and hurt feelings,⁸⁷ but none refer to the defendant’s wrong as the basis of the award.

In fact, both views are incomplete and therefore incorrect. Due to the functional comparability of remedial goals, and the consequent dual focus of defamation proceedings on the claimant’s damage and the defendant’s wrong, sanctions are imposed both for the damage suffered by the claimant *and* because of the wrong committed by the defendant.

This understanding of the justifications for the imposition of sanctions in defamation cases is not formally recognised in the case law. However, it flows from the foregoing analysis and accounts for the unique characteristics of the wrong of defamation, which protects a complex legal interest. This approach is atypical, but not unknown in tort law. It is the approach that was used in the late 1700s-early 1800s. Mitchell mentions it in his historical study of defamation. Considering the traditional relevance of the defendant’s malicious motive to the quantum of damages, he argues that:

‘The explanation lies in an approach to compensation different to the one we are familiar with today. The current approach is, broadly, to focus on correcting loss; the approach that can be seen in the late 18th and early 19th centuries, by contrast, awarded damages for loss *and* to mark the fact that the claimant had suffered a wrong. “Injury”, to use the word

⁸⁵ *John v MGN* (n 1), 607E-F (italics mine).

⁸⁶ *Kadir & Anor v Channel S Television Ltd* [2014] EWHC 2305, [2014] All ER (D) 175, [10].

⁸⁷ *John v MGN* (n 1), 607E-F; *Kadir* (n 86), [10].

employed in *Pearson v Lemaitre*, was not a synonym for loss. It was both the wrong and its consequences.’⁸⁸

This approach is currently found in at least one other tortious cause of action, that of false imprisonment. Indeed, the ‘unlawful imposition of constraint on another’s freedom of movement from a particular place’⁸⁹ is actionable regardless of the claimant’s knowledge of his imprisonment at the time the wrong was committed. This rule is rationalised on the basis of the supreme importance which the law attaches to the liberty of the individual.⁹⁰ The fact that the wrong is actionable in the absence of any special damage shows that damages are awarded, at least in part, to mark the fact that the defendant has culpably committed a wrong, which merits condemnation.

A similar approach is found in the French law of defamation. As is traditionally the case in England, in France criminal penalties are imposed because of the wrong committed by the defendant; and tortious remedies are awarded for the damage caused by the criminal wrong. The general rule is that the prosecution and the *action civile* can be brought independently from one another. However, in relation to the wrong of defamation criminal proceedings can only be launched on the basis of the victim’s preliminary complaint.⁹¹ This complaint can also launch the *action civile*; it is then described as a *plainte avec constitution de partie civile*. In these instances, the criminal proceedings are launched on the basis of the victim’s *action civile*.⁹² Sanctions for defamation are then imposed by the criminal judge both because of the wrong committed by the defendant and for the damage suffered by the claimant.

Overall, the identification of a dual focus in defamation proceedings (on the claimant’s damage and the defendant’s wrong) and of a related dual justification

⁸⁸ Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing 2005), 65.

⁸⁹ *Collins v Wilcock* [1984] 3 All ER 374, [1984] 1 WLR 1172, 1178.

⁹⁰ *Murray v Ministry of Defence* [1988] 2 All ER 521, [1988] 1 WLR 692, 703.

⁹¹ According to art. 48, 6° of the law of 29 July 1881, it is the victim who controls the action in defamation. The prosecutor can only pursue it on the basis of the victim’s official preliminary complaint. See above, IIB.

⁹² See, generally: Dreyer, *Responsabilités Civile et Pénale des Médias* (n 19), 727ff, specifically 729, 742, 762.

for the imposition of sanctions (for the claimant's damage and because of the defendant's wrong) uncovers a distinct measure of substantive similarity in English and French defamation laws. While each jurisdiction's regulatory features play a role in determining the form of the available legal responses, English and French responses to defamation are functionally comparable *despite the existence of such a link*. In fact, analysis of the objectives of defamation proceedings reveals the existence, in both systems, of a hybrid model of liability which draws on the traditional tortious and criminal models. This finding supports the argument announced in the Introduction, namely that despite substantive differences owing to their regulatory features, England and France adopt a shared conceptual approach to defamation.⁹³

Yet, a formal change in the nature of the regulation of defamation is highly unlikely, whether in England or France. In the former jurisdiction, recent reform has made a positive choice to reject the criminal regulation of defamation and so this position is likely to endure. In the latter jurisdiction, there exist political and social impediments to the amendment of the 1881 law, which have led to the rejection of the Guinchard Commission's proposition to decriminalise defamation.⁹⁴ In this context, the barriers to formal convergence of legal responses to defamation have been circumvented by their functional adaptability. This is evident from the fact that in France, the amount of fines in defamation cases has gradually been lowered:⁹⁵ as far as possible, the punitive goal has been relinquished. This has led to the emergence of a shared conceptual approach to the remedial aspects of defamation in England and France, as exemplified in both systems by the existence of a hybrid model of liability.

⁹³ Introduction, II.

⁹⁴ See: Commission sur la répartition des contentieux présidée par Serge Guinchard, *L'Ambition Raisonnée d'une Justice Apaisée* (La documentation française: Rapports officiels 2008), 290ff; and more generally the Introduction, II.

⁹⁵ Beignier, *L'Honneur et le Droit* (n 14), 183.

IV. A reconsideration of remedial aspects of defamation in light of the modes of protecting reputation

The comparative analysis of the English and French remedial aspects of defamation revealed the existence, in both jurisdictions, of a hybrid model of liability. This section investigates the origins of this model of liability. It argues that its emergence is due to a lack of reflection on the appropriate modes of protecting reputation, and a failure to recognise the link between these modes of protection and the remedial goals of defamation proceedings. A renewed reflection on the modes of protecting reputation in fact suggests that only two of them – vindication of one's good name and compensation of economic losses – should be retained.

A. The link between the modes of protecting reputation and the remedial goals in defamation actions

It was seen in Chapter 1 that in recent years, considerable efforts have been made in the common law literature to analyse the nature of reputation. Authors have uncovered 'constructs' of reputation (property, honour, dignity, sociality), which dictate distinct modes of protecting reputation (respectively compensating economic losses, compensating injured feelings, punishing the risk of breach to the public peace, and vindicating reputation in order to promote social cohesion). Based on these modes of protection, which involve different types of harm, it is possible to determine what the corresponding objectives of defamation law are. They are broadly to compensate, to punish and to vindicate. Not all systems will recognise all these modes of protecting reputation; consequently, defamation proceedings may feature different remedial goals from one jurisdiction to the other.

The problem with the current English and French hybrid models of liability is that they accommodate all the remedial goals listed above – compensation, punishment, vindication – without appropriately recognising or reflecting on the modes of protecting reputation. This is an illogical approach; the modes of protecting reputation should be the starting point and should dictate the

consequent remedial goals of legal responses to defamation. This is an important point. Indeed, in what follows I argue that two of the four main modes of protecting reputation should be abandoned. This argument has consequences on what I argue to be the appropriate remedial goals of defamation proceedings.

B. Punishing the (risk of) breaches to the public peace: an out-dated mode of protection

The first mode of protecting reputation which should be relinquished is that of punishing the (risk of) breach to the public peace, because it is out-dated. It originated in the honour construct of reputation, which Post defined as ‘a form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role.’⁹⁶ This type of reputation is directly linked to the individual’s social status and as such rests on a fundamentally unequal vision of society. It generated a concern to preserve the social peace against the practice of duelling, which was particularly popular in the 19th century. This was achieved through punishing breaches of the public order.

However, the non-egalitarian conception of society underlining the concept of reputation as honour is outmoded⁹⁷ and conflicts with the modern concept of equality.⁹⁸ What is more, changes in historical and societal circumstances have lastingly removed the need to punish the (risk of) breaches to the public peace. Given the decrease and ultimate disappearance of the practice of duelling identified in Chapter 3,⁹⁹ the dangerous practice that had originally justified that defamation actions integrate a remedial goal of punishment has died out. Since punishing the breaches of the public peace can no longer justify the protection of

⁹⁶ Robert C Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 Cal L Rev 691, 699-700.

⁹⁷ Eric Barendt, ‘What is the Point of Libel Law?’ (1999) 52 CLP 110, 116; David Howarth, ‘Libel: Its Purpose and Reform’ (2011) 74 MLR 845, 852.

⁹⁸ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIB.

⁹⁹ See Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IVA.

reputation, it must be recognised that the punitive goal of defamation proceedings is no longer relevant.

The evolution of French remedial goals to accommodate new objectives of compensation and vindication is an illustration of this phenomenon. Their gradual recognition was analysed in section III as circumventing the refusal to decriminalise defamation. While defamation remains a criminal wrong, defamation proceedings have integrated tortious remedial goals. This reflects a progressive loss of importance of the punitive goal of defamation proceedings and a gradual privatisation of the wrong.¹⁰⁰

C. Compensating injured feelings: a ‘category mistake’¹⁰¹

The second mode of protecting reputation that should be relinquished is that of compensating injured feelings, because it originates in a mistaken understanding of the interests that are protected by tort law. This means of protection is grounded in the dignity construct of reputation, which Mullis and Scott rationalised on the basis of the ‘looking-glass self’ theory.¹⁰² Under this view, wrongful interference with an individual’s reputation harms their self-esteem, seen as an aspect of their psychological integrity. In turn, this calls for these injured feelings to be compensated.

As is well known, the difficulty with rights whose violation causes an injury that is not patrimonial – including reputation – is that they cannot easily be assessed in money. Thus, in the English tort of defamation the general damages award is understood to serve one or more, often interlocking purposes, including consolation for the distress and hurt feelings which the claimant suffered from the publication of the statement (*‘solatium’*). According to Descheemaeker, using this concept generates two separate strands of ambiguity.¹⁰³

¹⁰⁰ See further below, VA and Chapter 6: Conclusions, III.

¹⁰¹ Descheemaeker’s word. See Descheemaeker, ‘*Solatium* and Injury to Feelings’ (n 35).

¹⁰² See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIB.

¹⁰³ Descheemaeker, ‘*Solatium* and Injury to Feelings’ (n 35), 71-74.

First, it is unclear whether the interests protected are the claimant's feelings ('internal' interests) or the claimant's *corpus*, *fama* or *dignitas* ('external' interests, specifically in our case the injury to reputation). Descheemaeker opposes the compensation of injured feelings by noting that only 'external' interests should be protected. He argues that it is illogical, in the context of rights whose violation causes a non-patrimonial injury, to compensate injured feelings rather than *corpus*, *fama* and *dignitas*. The reason for this is that the distinction between 'internal' and 'external' interests is not limited to causes of action generating non-patrimonial loss but rather 'cut[s] across the whole spectrum of the law of wrongs.'¹⁰⁴ Indeed, regardless of whether the right violated is patrimonial or not, the claimant always suffers a subjective emotional distress in addition to the right violation. If one's car has been damaged, the consequences can also be categorised on the 'external' and 'internal' levels: besides the fact that the claimant's property right has been violated, he is bound to suffer emotional distress flowing from the right violation. It is therefore incoherent to compensate 'external' interests in relation to violations of patrimonial rights, and 'internal' interests in relation to violations of non-patrimonial rights. In other words, it is incoherent to compensate one claimant for the value of the damage done to his car, and another claimant for the distress and hurt feelings which result from the injury to his reputation (rather than to compensate the injured reputation itself). It is even more incoherent to compensate both 'internal' and 'external' interests in relation to violations of non-patrimonial rights (say, in the defamation context, to compensate both injured feelings and the injury to reputation), as it essentially involves double counting the same rights violation.¹⁰⁵

This is a convincing argument, which is in line with the definition of the wrong of defamation. In Chapter 1, endorsing Stevens' theory of torts as violations of private rights, defamation was presented as an injury to one's right to reputation (in other words, to one's 'external' interest in reputation). Because reputational

¹⁰⁴ Ibid, 88.

¹⁰⁵ See generally: *ibid*.

injuries cannot be assessed monetarily, an instinctive connection is made between this type of harm and hurt feelings. The same cannot be said of property damage, for which the loss is intuitively apprehended as the diminution in value measured by the cost of repair. But the law must adopt a principled approach to damages awards: protection should be afforded to the same type of interest (external or internal), regardless of which type of right has been violated. The long-standing approach of the law is to approach emotional loss ‘indirectly, through the valuation of the external rights whose violation led to the inner turmoil.’¹⁰⁶ There is no reason to depart from this approach, and so what should be compensated in defamation is the injury to reputation rather than the claimant’s injured feelings.

The concept of ‘*solatium*’ also generates a second strand of ambiguity. Compensation for injured feelings fosters uncertainty as to whether the legal response to defamation aims at compensating the claimant or punishing the defendant. This ambiguity has been recognised above. It was noted in section III that the current compensatory award in England is both compensatory and punitive (for the part of the award that is in excess of compensation).¹⁰⁷ In fact, it is likely that the punitive part of the compensatory award accounts for the injury to the claimant’s feelings. This interpretation is supported by Greer LJ’s comments on the quantum of damages awarded in *Youssouppoff*.¹⁰⁸

‘[T]he damages are very large for a lady who... has not been able to show that her reputation has in any way suffered... [but] It is very difficult to put a money value upon the mental pain and suffering that were undergone.’¹⁰⁹

This statement suggests that the surprisingly high quantum of damages accounted for the claimant’s mental pain and suffering. What I analysed as the punitive part of compensatory damages is in this case directly justified on the

¹⁰⁶ Ibid, 91.

¹⁰⁷ See above, IIIA.

¹⁰⁸ *Youssouppoff v MGM Pictures Ltd* (1934) 50 TLR 581.

¹⁰⁹ Ibid, 586.

basis of the claimant's injured feelings. In France, compensation for injured feelings through the victim's *action civile* is also functionally ambiguous, insofar as the *action civile* is based on the (criminal) law on the press rather than on article 1382 of the Civil code.

The recognition of compensation of injured feelings as a mode of protecting reputation is therefore the result of a mistaken understanding of the interests protected by tort law. It complicates the attempts to unravel the losses in the tort of defamation and relatedly the identification of that tort's remedial goals. This mode of protection, and its related goal of compensation (of injured feelings), must be abandoned.

D. Two remedial goals for defamation: vindication and compensation (of economic losses)

Echoing the suggestions made in Chapter 1, the preceding analysis recommends that two modes of protecting reputation be abandoned – protecting the (risk of) breach to the public peace, because it is out-dated, and compensating injured feelings, because it originates in a 'category mistake'. Only two modes of protecting reputation should be retained: vindication of one's good name, and compensation of economic losses. Consequently, the remedial goals of defamation actions should strictly be to vindicate and to compensate.

Maintaining only two remedial goals of vindication and compensation of economic losses is in line with the understanding that defamation protects both the claimant's primary interest in his reputation, but also a number of other, secondary interests. Under this view, the losses caused by the wrong of defamation can be classified under two heads: (1) the basic injury to reputation and (2) consequential losses. The remedial goals of vindication and compensation of economic losses can be linked to these two categories of losses in defamation actions. The starting point is (1): the injury to reputation, for which the legal response must seek to vindicate the claimant's name. However it is also recognised that the claimant must be compensated for (2): losses consequential to the injured reputation. In theory, these can include both economic losses and

injured feelings. However, it was explained above that injured feelings should not be compensated; thus, they will not qualify as relevant compensable consequential losses. The secondary objective of defamation proceedings must strictly be to compensate the *economic* losses consequential to the injury to reputation.

Mullis and Scott have objected to the view that reputation must be primarily protected as a fundamental aspect of social interaction, which underlies the prescribed objective of vindication.¹¹⁰ They argue that there is a fundamental incompatibility between the quintessentially public nature of reputation and the idea that the right to private life in article 8 of the European Convention on Human Rights (ECHR) now extends to the protection of one's reputation.¹¹¹ Nevertheless, their argument is disputable. Howarth's sociality theory rationalises the protection of reputation on the basis of its importance for social cohesion. It is based on the idea that in relation to reputational losses 'society as well as the individual is the loser'.¹¹² This approach, which conceptualises reputation as a wrong which has consequences for the public as a whole, is also found in the honour construct of reputation. However, the sociality construct approaches it from a different perspective. It does not focus on the potential disruptions to the public peace, but rather on the interference with an individual's ability 'to form and maintain social bonds'.¹¹³ Contrary to the honour construct of reputation, the theory of sociality accommodates both public and private aspects of reputation. The 'threat of social isolation and rejection' can impact the society's cohesion as a whole, as well as the defamed individual's health and wellbeing.¹¹⁴ Under this view, there is no particular difficulty in recognising vindication as the primary goal of defamation proceedings whilst including the protection of reputation within the scope of article 8 ECHR.

¹¹⁰ See Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIA.

¹¹¹ Alastair Mullis and Andrew Scott, 'The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law' (2012) 63 NILQ 27, 41-42. On reputation falling within the scope of art. 8 ECHR, see Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IIIA.

¹¹² *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, [1999] 4 All ER 609, 201.

¹¹³ Howarth (n 97), 849.

¹¹⁴ *Ibid.*, 850.

V. Ramifications: the nature of the regulation and the importance of alternative remedies

The suggestion that there are only two relevant remedial goals in defamation actions (vindication being the primary one and compensation of economic losses the secondary one) has two practical consequences. First, defamation actions should no longer pursue punitive objectives, and the compensatory goal should be limited to compensation of economic losses. Second, the primary remedy for defamation should be relief *in natura* rather than an award of damages. Recognising these consequences and incorporating the recommended changes would effectively align the English and French remedial aspects of defamation.

A. Draining punitive goals and limiting compensatory goals in defamation actions

Since the modes of protecting reputation determine the relevant remedial goals of defamation actions, it is entirely obvious from the foregoing discussion that compensation of injured feelings should no longer be an objective of the law of defamation. It has been shown that the objective of compensation of injured feelings originated in a ‘category mistake’, which wrongly led to the recognition of another (equally mistaken) mode of protecting reputation. Thus, the compensatory goal must be limited to the claimant’s economic losses.

Likewise, the remedial goal of punishment, originally grounded in the out-dated concern to protect the public peace, should be abandoned. This has been duly recognised in England, where the Coroners and Justice Act 2009 abolished the criminal offence of defamatory libel.¹¹⁵ By contrast, in France the Guinchard Commission’s 2008 proposition to decriminalise defamation failed.¹¹⁶

¹¹⁵ It is true that some measure of punishment currently subsists in the compensatory award. However, the recognition that compensating injured feelings cannot be an official goal of defamation proceedings would lastingly remove the punitive effect of the part of the damages awarded in excess of compensation.

¹¹⁶ Above n 94.

Defamation remains a criminal wrong, and defamation actions consequently pursue punitive aims. The reason for this is simply that the French are culturally strongly attached to the criminal regulation of press wrongs, including defamation. Indeed, the law of 29 July 1881 is understood to offer a procedural framework which is extremely protective of the right to freedom of expression.¹¹⁷ By comparison, the law of article 1382 is seen as a threat to freedom of expression because it sidesteps the procedural guarantees offered to defendant publishers under the law on the press.¹¹⁸ Thus, in 2008 one lawyer commenting on the proposed decriminalisation of defamation claimed that ‘*la loi pénale protège la presse, la loi civile la menace*’ (criminal law protects the press, civil law threatens it).¹¹⁹ Although there are signs that the French wrong of defamation is growing more private in nature (because it uses tortious standards of liability,¹²⁰ has come to recognise an absolute defence of truth¹²¹ and pursues tortious remedial goals),¹²² the wrong has not been decriminalised.

This refusal to decriminalise defamation reveals a lack of reflection about the modes of protecting reputation (which clearly call for punitive goals to be abandoned). Maintaining the pre-existing state of affairs was the easier choice, but it is conceptually mistaken. A renewed reflection on the decriminalisation of defamation in France, and on the way in which to best balance the conflicting rights to reputation and to freedom of expression within the framework of civil liability, is necessary.¹²³

B. The pre-eminence of relief *in natura*

Once the law of defamation abandons the remedial goal of punishment and limits the compensatory goal, it will be left with two remedial goals: a primary goal of

¹¹⁷ Chapter 2: The framework of defamation liability in comparative historical perspective, IIIB.

¹¹⁸ Ibid, IIB4.

¹¹⁹ Jean-Pierre Mignard, ‘Dépénaliser la Diffamation: le Nouveau Miroir aux Alouettes’ *Médiapart* (Paris, 8 December 2008).

¹²⁰ See Chapter 3: Tortious and criminal standards of liability in the English and French laws of defamation, IIIB, IIIC.

¹²¹ See Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IIIB.

¹²² See above, IIIB.

¹²³ See further Chapter 6: Conclusions, III.

vindication (whereby reputation is protected as a means to promote social cohesion), and a secondary goal of compensation of economic losses. In *Cassell v Broome*, Lord Hailsham suggested that vindication could be successfully achieved through an award of compensatory damages. Indeed, the award was necessary:

‘[I]n case the libel, driven underground, emerges from its lurking place at some future date, ... [so the claimant is] able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.’¹²⁴

Contrary to this, it is submitted that the most effective type of legal redress is not monetary. Rather, the preferred form of redress should be a form of relief *in natura* (sometimes referred to as ‘alternative’ or ‘discursive’ remedies).¹²⁵ Indeed, the remedial efficacy of the traditional remedies (primarily, the compensatory damages award) is questionable.¹²⁶ It is widely recognised that in defamation proceedings something other than a mere economic interest is at stake. Thus, a South African case described the primary purpose of defamation proceedings as the vindication of ‘the intangible, socially-constructed and intensely meaningful good name of the injured person’.¹²⁷ In fact, based on the extremely high odds of losing a defamation suit, one researcher suggested that something other than the financial gain of damages awards motivates claimants to sue.¹²⁸ Though his empirical study is US-based, his suggestion is also true of English claimants, as is evidence by the fact that they sometimes seek

¹²⁴ Above n 46, 1071.

¹²⁵ See, for instance, Rosalie Jukier, ‘Non-Pecuniary Damages in Defamation Cases’ (1989) 49 *Revue du Barreau* 3, 39; Mullis and Scott, ‘The Swing of the Pendulum’ (n 111).

¹²⁶ In this sense: *Ward v James* [1966] 1 QB 273, [1965] 1 All ER 563, 296 (per Lord Denning MR): ‘[n]o money can compensate for the loss. Yet compensation has to be given in money. The problem is insoluble’.

¹²⁷ Sachs J, SA CC, *Dikoko v Mokhatla* [2006] 6 SA 235 (Constitutional Court), [111].

¹²⁸ Randall P Bezanson, ‘The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get’ (1986) 74 *California L Rev* 789. This study, conducted in the US in the 1980s, found that in retrospect and despite the fact that the proceedings did not find the defendant liable, 41% of the claimants considered that they had successfully defended their reputation and 40% that they had managed to stop further publicity. When asked what they would do if they were faced with the same situation again, 87% of the claimants declared that they would sue again (*ibid*, 799). So overall, claimants appear to seek a public forum in which to adjudicate their reputations, rather than a more traditional type of sanction.

declaratory relief (for instance a declaration of falsity) instead of the traditional remedies available in defamation actions.¹²⁹ In one such case, Eady J stressed that ‘the declaration of falsity... is not an empty gesture.’¹³⁰ Instead, claimants see it as a statutory means of obtaining vindication ‘in light of the evidence that they have put before the court.’¹³¹

This is consistent with the view taken in Chapters 1¹³² and 4,¹³³ namely that reputation as an aspect of sociality causes loss of status and of social ties. The inherently social nature of the wrong mandates that the aim of the defamation action be to vindicate the claimant’s reputation so as to rehabilitate him or her in the eyes of the community, and thus to strengthen social cohesion by ‘reversing some of the effects of rights-violations that are not captured by traditional ... awards.’¹³⁴ This understanding of vindication clearly conflicts with the use of damages awards as a vindictory means of redress. However, although some mechanisms of relief *in natura* already exist in the English and French systems, they are relegated to a position of secondary importance, and so their efficacy is limited.

1. Existing mechanisms of relief in natura in England in France

There already exist a number of mechanisms of relief *in natura* in both the English and the French laws of defamation. In England, the value of apologies and corrections has been recognised. The importance of an apology is first and foremost the validation that the claimant has been defamed against and that he was justified in bringing an action:¹³⁵ the claimant is ‘vindicated out of the defendant’s mouth’, more forcefully than from his own.¹³⁶ Various other

¹²⁹ See: *Loutchansky v Times Newspapers Ltd (Permission to Amend Particulars of Claim)* [2002] EMLR 44 (though in this case the declaration of falsity was refused); *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156.

¹³⁰ *Bin Mahfouz* (n 129), 72.

¹³¹ *Ibid*, 40.

¹³² Chapter 1: The modern law of wrongs against reputation: an overview and introduction to the tort/crime distinction, IIB.

¹³³ Chapter 4: A similar doctrine of truth across the tortious and criminal wrongs of defamation, IVB.

¹³⁴ Kit Barker, ‘The Mixed Concept of Vindication in Private Law: Private and Public’ in Stephen GA Pitel *et al* (eds), *Tort Law: Challenging Orthodoxy* (Hart Pub 2013), 81.

theoretical benefits of receiving an apology have been identified: adjusting an imbalance of power between the parties, attributing responsibility for harm, reducing the claimant's anger or desire to see the wrongdoer punished,¹³⁷ deterrence and the recognition of a symbolic value to the claimant who requested it.¹³⁸ The benefits of a sincere apology, coupled with appropriate corrections where the statement is false, can therefore go a long way in restoring the claimant's good name. This is because they possess the communicative aspect necessary to achieve the vindictory goal of defamation proceedings.

This has been acknowledged by the legislator. The summary procedure under sections 8 and 9 of the 1996 Defamation Act states that provision can be made for summary relief where a suitable apology, agreed by the parties, is made. Further, under section 2 of the 1996 Act, defendants are able to make an offer of amends, which includes an offer to publish a suitable correction and an apology. The case law has come to recognise such vindictory potential in the context of an offer of amends:

‘If an early unqualified offer to make amends is made and accepted and an agreed apology is published, ... there is bound to be substantial mitigation. The defendant ... has offered to make and publish a suitable correction and apology ... and has offered to pay proper compensation and costs... The claimant knows that his reputation has been repaired to the full extent that is possible. He is vindicated.’¹³⁹

Finally, section 12(1) of the Defamation Act 2013 now grants a court finding for the claimant the power to order the publication of a summary of the judgment. According to section 12(2), the wording of any summary, and the time, manner,

¹³⁵ Alfred Allan *et al*, ‘Parties’ Perceptions of Apologies in Resolving Equal Opportunity Complaints’ (2010) 17 *Psychiatry, Psychology and Law* .

¹³⁶ John G Fleming, ‘Retraction and Reply: Alternative Remedies for Defamation’ (1978) 12 *UBC L Rev* 15, 25.

¹³⁷ Daniel Shuman, ‘The Role of Apology in Tort Law’ (2000) 83 *Judicature* 180.

¹³⁸ Robyn Carroll, ‘You Can’t Order Sorrow, so is There Any Value in an Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases’ (2010) 33 *University of NSW L J* 360.

¹³⁹ *Nail v News Group Newspapers Ltd; Nail v Jones* [2004] *EWCA Civ* 1708, [2005] 1 *All ER* 1040, [41].

form and place of its publication are to be for parties to agree. This type of redress legitimates the claimant's assertion of falsity, and therefore goes a long way to restore his name.

A similar mechanism exists in France and is sometimes awarded as tortious redress following the claimant's *action civile*.¹⁴⁰ But perhaps more interesting are the French rights of correction and reply, whose importance is well established.¹⁴¹ The right of correction is defined in article 12 of the law on the press. It consists in the recognition of a right to insert a statement to make all relevant corrections to the original statement, insofar as it was inaccurate. It therefore allows for the truth of the statement to be established. The refusal to insert a correction in the relevant journal or periodical is a criminal wrong punishable by a fine of up to €3,750. This type of response is commonly assimilated to a retraction insofar as 'it forces the journal to publish the corrective matter as an authentic document, and not merely as the views of the other side'.¹⁴² Its undoubted advantages are its rapidity¹⁴³ and persuasive force.¹⁴⁴

The right of reply is established in article 13 of the law on the press. It is a general and unqualified right, granted to any person named in a published newspaper article.¹⁴⁵ It is vested in the person designated in the statement upon publication of the statement, and can therefore usefully mitigate reputational damage at the outset. The refusal to insert a reply amounts to a criminal wrong punishable by a maximum fine of €3,750, and up to three months' imprisonment if the original statement related to electoral matters.¹⁴⁶ Article 13, which acted as a model in other continental jurisdictions, has been the subject of extensive

¹⁴⁰ Beignier, *L'Honneur et le Droit* (n 14), 201.

¹⁴¹ David Dechenaud, *JCl. Lois pénales spéciales*, Fasc. n°40, 1.

¹⁴² Zechariah Chafee, 'Possible New Remedies for Errors in the Press' (1946) 60 *Harvard L Rev* 1, 13.

¹⁴³ Jukier (n 125), 47.

¹⁴⁴ Fleming (n 136), 25.

¹⁴⁵ Cass civ (2), 27 January 1993, n°91-15158.

¹⁴⁶ Art. 13, *alinéa* 9 of the law of 29 July 1881.

commentary by American jurists.¹⁴⁷ It has been praised for its rapidity and its mandatory force.¹⁴⁸ It is a procedure that empowers the victim, and re-establishes the moral equality of the parties that was interfered with by creating an adversarial discussion in the media. By contrast with court judgements, which rarely come to the attention of the public, its publication in the same media source as the original statement ensures a wide propagation of the claimant's view.¹⁴⁹ If the issue goes to court, it is likely to only raise simple issues for decision.¹⁵⁰

2. A similar hierarchy of sanctions: subsidiary importance of relief *in natura*

Despite the fact that mechanisms of relief *in natura* already exist in England and France, under their current form, their capacity to vindicate the claimant is somewhat limited. This is because both jurisdictions fail to recognise vindication as the primary remedial goal of defamation actions. Consequently, the most appropriate form of redress to vindicate the claimant's good name – relief *in natura* – remains subsidiary to the more traditional responses.

In England, the mechanisms of apology and correction can only be applied in two very limited settings: the summary procedure under sections 8 and 9 of the Defamation Act 1996, and the offer of amends procedure under section 2 of the same statute. What is more, although their vindicatory potential has been acknowledged both in doctrinal works and in practice, they are only taken into account as a factor mitigating damages. As such, when it is accepted the offer of amends allows a defendant to admit his wrong, offer a correction and/or apology and pay the complainant an agreed sum of money. But its importance remains secondary to that of monetary damages. Indeed, when the offer of amends is

¹⁴⁷ Fleming (n 136), George E Frasier, 'An Alternative to the General-Damage Award for Defamation' (1968) 20 Stanford L Rev 504; James H Hulme, 'Vindicating Reputation: An Alternative to Damages as a Remedy' (1981) 30 Am U L Rev 375; Richard C Donnelly, 'The Right of Reply: An Alternative to an Action for Libel' (1948) 34 Virginia L Rev 867; Chafee (n 142).

¹⁴⁸ Jukier (n 125), 47; Chafee (n 142), 31.

¹⁴⁹ Jukier (n 125), 47.

¹⁵⁰ Chafee (n 142), 31.

accepted, the correction and apology does not allow the defendant to escape paying damages. They only mitigate the quantum of damages. The general tort conceptualisation of an award of damages as ‘*the remedy for all civil wrongs*’¹⁵¹ is not questioned. The limited efficacy of apologies and corrections was also seen in claims brought before the (now abolished) Press Complaints Commission (PCC). While apologies were used by the PCC as a method of facilitating a settlement between the complainant and a publisher, they were only perceived as a mechanism assuaging wounded feelings.¹⁵² In fact, apologies are no longer used in the complaints brought before the Independent Press Standards Organisation (IPSO), which replaced the PCC in October 2014. The only remedies available for breaches of the Code of Practice are ‘the publication of [the Complaints Committee’s] upheld adjudication and/or a correction.’¹⁵³

Further, the efficacy of section 12 of the 2013 Act has been questioned on account of the fact that so far, the existence of a reasoned judgment has had a limited influence on the quantum of damages attributed to the claimant. In *Purnell v F1 Business Magazine Ltd & Another*,¹⁵⁴ Laws LJ considered that:

‘The effect of such an earlier judgment no doubt depends on all the circumstances and, generally speaking, the effect in relation to vindication will I think most likely be marginal.’¹⁵⁵

This reasoning can be extended to the mechanism in section 12 to suggest that this alternative remedy will have a limited impact. The public will likely continue to turn to the quantum of damages to determine whether or not the claimant’s reputation was injured.¹⁵⁶ Therefore, in relation to the remedial

¹⁵¹ *Cassell* (n 46), 1127 (italics mine).

¹⁵² Jonathan Burchell, ‘Retraction, Apology and Reply as Responses to *Iniuriae*’ in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law* (Hart Pub 2013), 212.

¹⁵³ Independent Press Standards Organisation, *Complaints Procedure* <<https://www.ipso.co.uk/IPSO/procedure.html>> accessed 17 September 2015, 5. Remedies.

¹⁵⁴ Above n 61.

¹⁵⁵ *Ibid*, [29].

¹⁵⁶ In this sense: *Cairns v Modi* (n 54), [31]-[32]; *Cruddas v Adams* [2013] EWHC 145, [2013] All ER (D) 21, [43]: ‘any such observations, contained in a judgment of the court, are unlikely to achieve very much in themselves. What most interested observers will want to know is, quite simply, “how much did he get?”’.

aspects of defamation the 2013 Act is a missed opportunity. It brings little change to improve the vindicatory potential of the law;¹⁵⁷ and since it came into force on 1 January 2014, there will likely be no further reform of the law in the near future.¹⁵⁸

In France, the order to publicise the judgment is also limited in that it can only be awarded as a remedy to the victim's *action civile*. It is not a type of legal redress established by the law of 1881; as such, awarding it outside of the *action civile* would constitute a secondary penalty, which can only be awarded in specific circumstances.¹⁵⁹

More importantly, despite the praise that is formulated in favour of the French rights of correction and reply, on closer analysis their importance appears to be restricted. The scope of the right of correction is dually limited. First, it is only applicable to statements published in the periodical press. More importantly, according to article 12 *alinéa* 1 of the law on the press, it is only applicable to statements concerning governmental matters carried out by persons discharging a public mission service. The purpose of the right of correction is to protect the government against the falsehoods published in the media regarding its mode of functioning.¹⁶⁰ The interests it protects are those of the state rather than those of private individuals. Its vindicatory potential is therefore non-existent in relation to private claimants.

The right of reply is also unduly praised for its vindicatory potential for the private claimant's reputation. A number of critiques have been made against it. Since the reply is only subjected to limited judicial control, there are possibilities for abuses: it 'can be made futile by a little ingenuity. A newspaper can accompany the printed reply with a second insult worse than the first.'¹⁶¹ Further,

¹⁵⁷ See further Alastair Mullis and Andrew Scott, 'Tilting at the Windmills: the Defamation Act 2013' (2014) 77 MLR 87, specifically 107ff.

¹⁵⁸ Though substantial reform of press regulations has been carried out following the Leveson inquiry, notably through the replacement of the PCC by the IPSO.

¹⁵⁹ Roger Merle and André Vitu, *Traité de Droit Criminel*, 754.

¹⁶⁰ Dechenaud (n 141), 21.

¹⁶¹ Chafee (n 142), 33.

the scope of the right of reply is limited. It is both too narrow (it is limited to a publication in a periodical, newspaper or journal) and too wide (it is applicable to any person designated in the publication, regardless of the defamatory nature of the words). Its vindicatory potential is therefore doubly limited. The right of reply is not available to all defamed claimants, depending on where the statement was published. It is also limited to providing the claimant's view rather than to mark the fact that his reputational right was infringed. There is another, stronger line of criticism that has not been noted thus far. Neither the right of reply nor the proceedings originating in the refusal to insert such a reply constitute a remedy. The criminal proceedings compelling the insertion of a reply are wholly independent from defamation proceedings.¹⁶² Where the right of reply has been exercised, it can in theory result in the mitigation of damages; however in practice judges often ignore it.¹⁶³ This suggests that article 13 is only granted a subsidiary status in the 1881 law. Its importance is secondary to that of traditional sanctions, since its only effect is to reduce the quantum of damages.¹⁶⁴

To conclude, in both England and France the recognised inefficacy of traditional remedies has led to the recognition of some mechanisms of redress *in natura*. But in both jurisdictions they remain relegated to a position of secondary importance: they are only relied on in mitigation of damages. In order to implement the remedial goals of vindication and compensation of economic losses in an efficacious manner, it would be necessary to invert the hierarchy of legal responses. Reflecting the fact that vindication is the primary goal of defamation actions, relief *in natura* should be the standard remedy. More traditional means of redress such as damages awards should only be subsidiary to a scheme of 'alternative' remedies, which could include but would not be limited to the current mechanisms of relief *in natura*. If these changes were to be implemented, the English and the French remedial aspects of defamation would not just be functionally comparable, as is presently the case. They would become positively aligned with one another.

¹⁶² Dechenaud (n 141), 48.

¹⁶³ Auvret (n 55), 76.

¹⁶⁴ Ibid.

VI. Conclusion

Beyond the obvious substantive differences in the English and French legal responses to defamation, which are dictated by their respective regulatory features, this chapter argued that they are functionally comparable. Indeed, in both systems defamation actions pursue compensatory, vindictory and punitive goals. This finding challenges the strength of the link between the English and French regulatory features and their substantive approach to the remedial aspects of defamation. The consequence of this functional comparability is the creation of a hybrid model of liability, which draws on the tortious and criminal models of liability. The existence of such a hybrid model of liability illustrates the fact that England and France adopt a shared conceptual approach to key aspects of defamation despite substantive differences owing to their regulatory features.

The explanation for the current state of affairs is found in a lack of reflection around the modes of protecting reputation. Their analysis in fact suggests that only two such modes of protection should be retained – that of vindicating the claimant's good name, and that of compensating his (consequential) economic losses. This finding has significant practical consequences: it calls for the abandonment of any punitive goals and for mechanisms of relief *in natura* to become the standard remedy. Should these suggestions be implemented, England and France would effectively adopt a common remedial framework.

CHAPTER 6

CONCLUSIONS

I. Introduction

The perception that the domestic laws of defamation are fundamentally different across the European Union (EU) is reinforced by the fact that the nature of the regulation – tortious or criminal – varies considerably from one jurisdiction to the other. These divergences are sometimes rationalised on the basis of distinct approaches to conceptual legal frameworks.¹ In this thesis, I have challenged this view by arguing that despite substantive differences owing to the regulatory features of each system, England and France adopt a shared conceptual approach to the wrong of defamation. The purpose of this final chapter is to bring together the analysis in the preceding chapters to draw conclusions and reflect on the consequences of the thesis' findings.

In section II, confirming the argument announced in the Introduction,² I illustrate the existence of a shared conceptual approach in the English and French laws of defamation, despite the remaining substantive differences which are dictated by the regulatory features of each system. In the sections that follow, I consider the ramifications of this finding and offer a new perspective on the decriminalisation and harmonisation debates. In section III, I note that there are two factors which, in addition to the 'chilling effect' of criminal libel, mandate a renewed debate on the necessity of decriminalising French defamation law. In section IV, I reflect on the feasibility of harmonising the laws of defamation across the Member States of the EU by challenging the perceived 'heterogeneity of the national laws in this area'.³ In the concluding section, I reflect on further research that may be carried out on the basis of this thesis' conclusions.

¹ David Kenny and Liz Heffernan, 'Defamation and Privacy and the Rome II Regulation' in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2015), 325.

² Introduction, II.

³ Kenny and Heffernan (n 1), 325.

II. A similar conceptual approach to defamation in England and France

A starting point of the thesis was the noticeably divergent structure of defamation liability in England and France. The opposition between tortious and criminal liability, and the existence or absence of a sub-division of the wrong of defamation according to the (im)permanence of the statement suggested that the two systems were very dissimilar, and as such were not comparable. The opposite outcomes of the recent decriminalisation movements (which led to the abolition of the offence of defamatory libel in England, but did not come to anything in France) strengthened this view.

Contrary to this, the analysis in Chapter 2 revealed a similar philosophy underlying the English and French frameworks of liability. Indeed, it was argued that the historical divergence in the regulatory features (with a pre-eminence of tortious liability in England, and criminal liability in France) was influenced by similar considerations relating to fundamental rights. Both jurisdictions sought to establish a framework of liability that would offer the best possible protection to the right to freedom of expression. However, owing to past experiences and the internal characteristics of the common law and civilian legal traditions, these similar considerations led to different regulatory outcomes.

The criminal regulation of defamation was not unknown in either England or France; however, each system's experience of the criminal wrong of defamation differed. In England, the arbitrariness of political libels and the traditional predominance of criminal actions against newspapers, which effectively permitted governmental censorship, led to heavy criticism of the criminalisation of defamation.⁴ By contrast, in France the criminal regulation of defamation was widely accepted. The protection of freedom of expression was therefore achieved within the criminal framework by establishing unique procedural rules in the law of 29 July 1881. This led to the – seemingly counter-intuitive – view that the

⁴ Chapter 2, IIIA.

criminal law is more protective of freedom of expression than its civil counterpart.⁵

In addition to past experiences of the criminal regulation of defamation, the internal characteristics of the common law and civilian legal traditions also shaped the regulatory outcomes in England and France. In both systems the concern to protect the right to freedom of expression led to the rejection of a general principle of liability for defamation in favour of precisely defined legal principles. Significantly, the areas of law that feature these precise legal rules are not the same in England and France. In England, despite the emergence of the tort of negligence, precise legal rules remain a distinguishing trait of tortious liability. On the other hand, in France these precise legal rules are found in the criminal law; tortious liability turns to the *clausula generalis* of article 1382 of the Civil code. The regulatory features of the English and French laws of defamation were therefore largely determined by the internal characteristics of the common law and the civilian legal tradition.⁶

Thus, the philosophy underlying the regulatory outcomes in England and France was similar, although the reasoning processes diverged significantly.⁷ I consequently argued that the regulatory features of England and France do not originate in a reasoned choice; rather, they are path dependent. This finding is of utmost importance, because it suggests that the distinction between tortious and criminal liability in England and France does not necessarily epitomise fundamentally irreconcilable conceptions of reputation. Indeed, in the last section of Chapter 2 I denied that the English and French regulatory features have had any influence on the internal structure of the wrong. More specifically, I rejected the argument that the English-specific distinction between libel and slander could be rationalised on the basis of the English tortious type of regulation. To the contrary, I explained it on the basis of a mistaken focus on the means of committing the wrong, which is also found in the French law on the press.⁸

⁵ Chapter 2, IIIB.

⁶ Chapter 2, IIIC.

⁷ Chapter 2, IIIA, IIIB.

⁸ Chapter 2, IV.

In the analysis that followed, I built on this reasoning to positively establish the comparability of the English and French laws of defamation *despite* their different regulatory features. Chapters 3-5 focused on features of the English and French laws of defamation that follow the general structure of the law of wrongs. They presented a specific interest because they appeared to differ significantly on account of each system's distinct regulatory features. Yet, on closer analysis the link between the nature of the regulation – tortious or criminal – and the substantive content of the rules is not as strong as was originally suggested, and in some cases has even disappeared. In fact, in respect of each studied feature, I argued that England and France adopt a common conceptual approach.

In Chapter 3, I noted that there is no direct link between the traditional tortious and criminal standards of liability and those which are currently applied in the English and French laws of defamation. England draws on notions that originate in the criminal rules on fault (such as intent to injure);⁹ conversely, France has integrated a strict liability standard which is typically found in tortious causes of action.¹⁰ Further, when comparing the standards of liability by reference to the hierarchical lines along which responsibility for defamation is organised in English and French law, it became apparent that the rules on fault are broadly similar across the two systems. They illustrate a common approach to fault in the English and French laws of defamation.

Thus, the nature of the regulation has had a limited influence on the English and French rules on fault.¹¹ Rather, they are the direct result of a concern to implement strict standards of liability in relation to media defendants at a time when the press was expanding rapidly.¹² Their preservation was explained in Chapter 3 on account of notions of embeddedness. They are maintained because they express a habit of dealing with fault standards in a particular way. Efforts to

⁹ Chapter 3, IIIA.

¹⁰ Chapter 3, IIIB.

¹¹ Chapter 3, IIIC.

¹² Chapter 3, IVA.

change them have been either unsuccessful or inexistent, due to societal factors.¹³ Overall, it is clear from the analysis in Chapter 3 that England and France's regulatory features have had a limited influence on their standards of liability. They are broadly similar and, though inappropriate, they are embedded in the English and French laws of defamation and are resisting legal change.

In Chapter 4, the absence of a link between the nature of the regulation and the substantive rules on defamation in England and France became even more apparent. The comparative historical perspective highlighted the fact that the rules on truth were originally linked to the nature of the regulation. In the tortious wrong of defamation, the value of truth has long justified the rule that its exposure be the paramount interest and that the law should consequently recognise an absolute defence of truth. By contrast, in the criminal wrong of defamation the focus was on the wrong committed by the defendant and the public disorders that it could cause. Thus, the issue of truth or falsity was largely irrelevant, the primary focus being on the preservation of the public peace.¹⁴ Yet, 20th century and more recent legal developments have gradually aligned the French rules on truth with their English counterpart. Both systems now focus on the protection of reputation against false statements;¹⁵ therefore, the link between the nature of the regulation and the substantive rules on truth has been broken. In the final section of Chapter 4, I positively identified a shared approach to truth in England and France. In both jurisdictions there is a presumption of falsity, which is for the defendant to rebut. Thus, truth is a defence (rather than falsity being a constituent element of the wrong). This is the result of a similar balancing of the conflicting rights to reputation and freedom of expression.¹⁶ What is more, the *replicationes* to the truth defence follow the same approach in England and France. They protect the defamed individual's privacy as a secondary interest, and promote the public interest in social cohesion,¹⁷ which underlies what I later

¹³ Chapter 3, IVB.

¹⁴ Chapter 4, IIIA.

¹⁵ Chapter 4, IIIB.

¹⁶ Chapter 4, IVA.

¹⁷ Chapter 4, IVB.

argued in Chapter 5 should be recognised as the primary mode of protecting reputation: the vindication of the defamed claimant's good name.

As a result, England and France's regulatory features no longer have any influence on the rules on truth. I argued in Chapter 4 that the reason for this was a change in historical and societal circumstances. The gradual disappearance of the practices of duelling and relatedly of the (risk of) breaches to the public peace led the French law of defamation to recognise the public interest in exposing the truth.¹⁸ This paved the way for the emergence of a shared conceptual approach to truth in England and France.

In Chapter 5, I analysed the remedial aspects of the English and French laws of defamation. At first sight, the English remedies and French penalties are directly dictated by the regulatory features of each jurisdiction, and their official functions (whether stated or underlying) are aligned with the goals of tort and criminal law respectively.¹⁹ However, the analysis of the objectives of defamation proceedings in England and France highlighted a discrepancy between the official goals of the law of defamation and the goals that are applied, in practice. Thus, the English tort of defamation recognises a measure of punishment.²⁰ Conversely, the French criminal wrong of defamation has integrated goals of compensation and vindication.²¹ As a consequence, the English and French remedial aspects of defamation are functionally comparable in that they pursue the same objectives of compensation, vindication and punishment (although these are weighed differently). And so it became apparent in Chapter 5 that the link between the English and French regulatory features and the remedial aspects of defamation is not as strong as was originally suggested. A common conceptual approach was subsequently identified in what I labelled a hybrid model of defamation liability, which possesses characteristics of both the tortious and the criminal models of liability.²²

¹⁸ Chapter 4, IIIB2.

¹⁹ Chapter 5, IIB.

²⁰ Chapter 5, IIIA.

²¹ Chapter 5, IIIB.

²² Chapter 5, IIIC.

In the final sections of Chapter 5, I explained the functional comparability of the English and French remedial aspects of defamation, and their shared hybrid model of liability, on the basis of a lack of reflection around the appropriate modes of protecting reputation, which in turn determine the remedial goals of defamation actions. I suggested that two of the main modes of protecting reputation should be abandoned: punishment of breaches to the public peace (because it is out-dated)²³ and compensation of injured feelings (because it relies on a mistaken understanding of the interests which are protected by tort law).²⁴ Thus, only two modes of protecting reputation should be maintained: vindication of one's good name in order to promote social cohesion (because reputation is a fundamental aspect of social interaction), and compensation of economic losses (because interference with reputational interests can cause significant economic damage). I then explored the consequences which these recommended changes would have on the appropriate objectives of defamation proceedings (they would strictly be to vindicate and compensate the claimant)²⁵ and form of remedies for reputational injuries (relief *in natura* would be favoured over more traditional methods of redress).²⁶ The recognition and implementation of these changes in England and France would have the effect of aligning their responses to the wrong of defamation and, ultimately, of creating a common remedial framework.

I concluded by noting that the functional comparability of the English and French remedial aspects of defamation challenges the strength of the link between their regulatory features and their substantive rules. England and France currently share a similar conceptual approach to the remedial aspects of defamation, as is evidenced by the existence, in both systems, of a hybrid model of liability.

Overall, what becomes apparent from the foregoing discussion is that although the English and French laws of defamation have different regulatory features, a

²³ Chapter 5, IVB. See further below, III.

²⁴ Chapter 5, IVC.

²⁵ Chapter 5, IVD.

²⁶ Chapter 5, V.

substantial measure of commonality can be found between the two systems. In each chapter, I challenged the strength (or the continued existence) of the link between the English and French regulatory features and their substantive rules on defamation, and positively identified a similar approach to key aspects of the law of defamation. Thus, confirming the argument announced at the start of the thesis,²⁷ it is clear that despite substantive differences owing to the regulatory features of each system, England and France adopt a shared conceptual approach to the wrong of defamation. In what follows, I highlight the ramifications of my analysis. As was suggested in the Introduction,²⁸ the findings of this thesis might influence the future developments of the law of defamation in two ways. First, factors have emerged over the course of the preceding analysis which highlight the continued relevance of the decriminalisation debate; second, the broad comparability of the English and French laws of defamation challenges the perception that there is ‘no common vision as to how [harmonisation] might best be achieved.’²⁹

III. Ramification (1): the decriminalisation debate

The decriminalisation debate is typically grounded in the ‘chilling effect’ created by the criminal regulation of abuses of the right to freedom of expression.³⁰ The analysis in the preceding chapters uncovered two additional factors which suggest that a renewed debate on the decriminalisation of French defamation law is warranted.

First, the analysis of the modes of protecting reputation in Chapter 5 showed that the concern to punish the (risk of) breaches to the public peace is out-dated, as is its associated punitive goal. The refusal to decriminalise defamation despite the Guinchard Commission’s 2008 recommendations³¹ is therefore the result of a mistake. It was prompted by a concern to preserve the current criminal

²⁷ Introduction, II.

²⁸ Ibid.

²⁹ Kenny and Heffernan (n 1), 326.

³⁰ Introduction, II.

³¹ Commission sur la répartition des contentieux présidée par Serge Guinchard, *L'Ambition Raisonnée d'une Justice Apaisée* (La documentation française: Rapports officiels 2008), 290ff.

framework of liability, which is viewed as being more protective of the right to freedom of expression than the tortious one. The law of article 1382 is seen as a threat to freedom of expression because it sidesteps the procedural guarantees offered to defendant publishers under the law on the press.³² Yet, this refusal to decriminalise defamation failed to question the continued relevance of the punitive goal. That the need to punish the (risk of) breaches to the public peace is out-dated is not a revolutionary suggestion. As early as 2001, in the context of the English offence of defamatory libel, Walker noted that:

‘There is no [longer any] convincing rationale for the offense, as the historic concerns about the standing of “great men” and the prevention of more violent resolutions, such as duelling, have largely disappeared.’³³

Because it is no longer necessary to punish the (risk of) breaches to the public peace, considering a possible decriminalisation of the French wrong of defamation would be logical. If the French legislator did revert to a tortious regulation of defamation on the basis of the disappearance of the historic necessity to punish breaches of the peace, his choice would provide a good illustration of Stevens’ theory on the relationship between tortious and criminal wrongs, which I outlined and endorsed in Chapter 1. According to Stevens, tortious wrongs are a basic category, which the criminal law builds upon in order to determine whether the given wrong is sufficiently serious to warrant a public sanction.³⁴ Under this view, since there is no longer any rationale warranting the criminalisation of defamation in France, it is necessary to reconsider its potential decriminalisation. This is not only because of the ‘chilling effect’ that the criminal regulation of defamation creates in France; it is also because there is no longer any strong public policy argument in favour of criminalising defamation.

In addition to the out-dated character of the punitive goal and despite the resistance encountered by decriminalisation movements in France, the French cause of action has grown distinctly more private, to the point that it questions

³² Chapter 2, IIB4.

³³ Clive Walker, ‘Reforming the Crime of Libel’ (2005) 50 N Y L Sch L Rev 169, 201.

³⁴ Chapter 1, VF.

the continued relevance of a criminal regulation of defamation. In Chapter 3, it was noted that the law of 29 July 1881 implemented a strict liability standard, which reflects a tortious standard of liability and cannot be reconciled with the general rules on fault in criminal law.³⁵ Of even greater significance is the fact that the French criminal law of defamation has come to accept an absolute defence of truth, subject to the provisions of article 35, *alinéa* 3 a) of the law on the press. As explained in Chapter 4, the purpose of the criminal law of defamation – the protection of the public peace – warrants indifference to the truth or falsity of the statement.³⁶ The fact that the treatment of the French *exceptio veritatis* has gradually become practically analogous to that of the English defence of truth suggests that the French wrong's centre of gravity is shifting. The wrong is coming to accept the tortious treatment of truth. Thus, although the protection of one's reputation is a valid limit to the right to freedom of expression, the value of truth justifies that its exposure be considered the paramount interest. Therefore, the focus of the wrong is no longer on the (potential) breaches to the public peace, but rather on the claimant's reputation. Such a focus on the claimant's damage rather than on the defendant's wrong is a distinguishing trait of tortious, rather than criminal liability. Finally, in France the *action civile* for defamation is now based on the (criminal) law on the press. It was consequently deduced in Chapter 5 that the French law of defamation has come to recognise a goal of compensation, which traditionally characterises tortious, rather than criminal proceedings.³⁷

This changing attitude is reflected in statutes. The law of 15 June 2000 abolished the paradigmatically criminal imprisonment penalty in defamation cases. The law of 29 July 1982 on online communications adopted the concept of *réputation*, relinquishing the notions of *honneur* and *considération* which are traditionally used in France. Although this change of terminology is somewhat isolated, it is worth noting. Indeed, it sidesteps the distinction between *honneur* and *considération*, which is difficult to ascertain and implicitly carries with it out-dated notions of rank or status. As seen in Chapter 2, these notions grounded

³⁵ Chapter 3, IIIB2c).

³⁶ Chapter 4, IIIA.

³⁷ Chapter 5, IIIB.

the idea that defamation is a public wrong warranting criminalisation.³⁸ Adopting the concept of *réputation* therefore distances French law from the traditional criminal framework of liability.

The out-dated character of the policy argument in favour of criminalising defamation, and the gradual privatisation of the French wrong highlight the need for a renewed reflection on decriminalisation of French defamation law. This reflection needs to go beyond the traditional suggestions for reforming the provisions of the law on the press. Indeed, these suggestions for reform are inherently limited in that they focus on legal change within the criminal framework, for instance by extending the prescription period. They consequently fail to recognise the fundamental questions that must be addressed in relation to defamation. The first question is whether defamation requires a (literally) extraordinary framework of liability in order to protect the right to freedom of expression. This issue has been touched upon in Chapter 2 when comparing the position of defamation on the English and French national legal maps.³⁹ In light of the English regulation of defamation, it appears that a freestanding framework of liability may not be necessary, although some procedural safeguards (including a short limitation period, but perhaps not as short as the French one) are indispensable. The second (and more fundamental) question is whether the current framework of liability – specifically, the criminal regulation of defamation – is adequate. This will be best approached in light of the discussion on the justifications for protecting reputation.

IV. Ramification (2): the harmonisation debate

The analysis in the preceding chapters also offers a new perspective on the practical feasibility of harmonisation of defamation laws in the European Union. The Introduction mentioned the difficulties encountered in finding a consensus as to how to include defamation within the scope of the Rome II Regulation.⁴⁰ It noted that one suggestion to simplify the current state of affairs is to harmonise

³⁸ Chapter 2, IIB3.

³⁹ Chapter 2, IIIC1.

⁴⁰ Introduction, I.

the substantive laws of defamation in the European Union. However, the perception that the domestic laws of defamation are fundamentally different across the EU has prevented an in-depth consideration of the feasibility of such harmonisation.

The issues of harmonisation and decriminalisation are often approached together.⁴¹ When doing so, a considerable practical hurdle to the harmonisation of defamation laws across the EU is the fact that the juridical categorisation of defamation varies greatly as between the twenty-eight Member States. This issue is at the core of the thesis, which considered the extent to which the nature of the regulation – tortious or criminal – influences the substantive content of the rules on defamation in England and France. Its conclusion, outlined above in section II, is that despite substantive differences owing to the regulatory features of each system, England and France adopt a shared conceptual approach to the wrong of defamation. This is significant for the harmonisation debate, as it challenges the traditional understanding that the distinct juridical categorisations of defamation preclude a finding a similarity.

Indeed, the similarities outlined in the previous chapters – similar frameworks of liability and standards of fault, a shared conceptual approach to truth, the functional comparability of the remedial aspects of defamation – indicate that contrary to Kenny and Heffernan’s claim,⁴² the English and the French laws of defamation do share a similar conceptual legal framework. This challenges the perceived ‘heterogeneity of the national laws in this area’,⁴³ often exemplified by the distinct regulatory features in each jurisdiction. Thus, the view that there exist fundamental differences in the domestic laws of the twenty-eight Member States appears not to be grounded in an in-depth research going beyond the superficial level of labels. Further in-depth research will therefore be necessary

⁴¹ In this sense, see: Directorate General of Human Rights and Legal Affairs, ‘Study on the Alignment of Laws and Practices Concerning Defamation With the Relevant Case-Law of the European Court Of Human Rights on Freedom of Expression, Particularly With Regard to the Principle of Proportionality’ CDMSI(2012)Misc11 (2013). The first thing that this harmonisation study notes is the fact that a number of jurisdictions still retain a criminal regulation of defamation (at 7).

⁴² Kenny and Heffernan (n 1), 325.

⁴³ Ibid.

to establish whether the recommended substantive harmonisation of defamation laws is feasible, or not.

V. Concluding remarks and further research

In conclusion, the laws of defamation in England and France are not so dissimilar as was originally suggested by the apparent irreconcilability of the nature of their regulation. Of course, there exist substantive differences owing to the regulatory features of each system. However, this thesis has proved that the nature of the regulation is not always the sole, or even the primary determinant of the substantive content of the rules on defamation. In fact, I have identified the existence of a shared conceptual approach to key aspects of the wrong of defamation in England and France.

The findings of the present study suggest that there is ample scope for further research in this area, both within the English and the French laws of defamation, and more broadly across the domestic laws of defamation of the Member States of the European Union. As this study has shown, in England and France the balance in the modes of protecting reputation has changed. Further research on the current balance can shed new light on the necessity to implement alternative remedies as the primary means of redress for reputational harm, and on which type of remedy would be appropriate to do so. Second, and specifically in relation to France, the tension between the modern justifications for protecting reputation and the barriers to decriminalisation (both practical and cultural) calls for renewed scrutiny. Third, and finally, further comparative research on other Member States' laws of defamation will be necessary to extend the thesis' findings and to establish the practical feasibility of substantive harmonisation.

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